IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No. 21 of 2020
(Formerly Cause No. FSD 162 of 2019 (RPJ))

BETWEEN

SCULLY ROYALTY LTD.
First Appellant/First Defendant

MFC 2017 II LTD.
Second Appellant/Fifth Defendant

-AND-

RAIFFEISEN BANK INTERNATIONAL AG
Respondent/ Plaintiff

Before:	The Hon Dennis Morrison, Justice of Appeal The Rt Hon Sir Alan Moses, Justice of Appeal The Hon Sir Michael Birt, Justice of Appeal
Appearances	John Wardell QC instructed by Nicholas Fox and Harry Rasmussen of Mourant for the Appellants Tim Penny QC instructed by William Jones and Christopher Levers of Ogier for the Respondent
Heard:	13 and 14 September 2021
Draft circulated:	14 December 2021
Judgment Delivered:	30 December 2021

JUDGMENT

Birt, JA

1. By orders dated 1 May 2020, Parker J continued a freezing order which had been granted ex parte against the First Appellant ("D1") and granted a similar freezing

order against the Second Appellant ("D5"). The two orders are in similar form and restrain D1 and D5 from disposing of, dealing with or diminishing the value of certain assets specified in Schedule 1 of the orders.

2. The Appellants now appeal against the decision of Parker J. They submit that the freezing orders should not have been granted; and if the Court is against them on this aspect, they submit that the orders should be subject to a cap by reference to the amount of the claim brought by the Respondent (who is the Plaintiff in the main proceedings and to whom I shall refer as "RBI" or "the Plaintiff").

3. The events which form the basis of the claims brought by RBI are quite complex, not least because a number of the companies went through changes of name over the relevant period. I propose therefore, for convenience, to refer to any company which is a Defendant in the proceedings as, for example, D1.

The factual background – an overview

4. RBI is an Austrian bank. For many years it has provided facilities for the MFC Group ("MFC" or "the Group"). When the guarantee referred to below was entered into in January 2017, LTC Pharma (Int) Limited, the Second Defendant in these proceedings ("D2") was the top company of MFC and its shares were listed on the New York Stock Exchange. All the companies in the Group were direct or indirect subsidiaries of D2. At the time, it was incorporated in the province of British Columbia, Canada and was called MFC Bancorp Limited.

5. Amongst its subsidiaries were a group of companies which the parties have referred to as the Austrian Sub-Group. The top company of the Austrian Sub-Group (under D2) was a company called MFC Corporate Services GmbH (formerly called MFC Commodities GmbH ("MFCC"). MFCC and its subsidiaries had substantial borrowings from RBI.

6. In February 2016, German Pellets GmbH ("German Pellets") filed for insolvency. German Pellets was MFCC's largest customer and its insolvency caused significant financial difficulties for the Austrian Sub-Group. Thereafter discussions took place between RBI and MFC in relation to the indebtedness of MFCC and its subsidiaries to RBI.

7. These discussions were brought to a successful conclusion on 2 January 2017, when RBI entered into a Credit Facility Agreement ("the Credit Agreement") with MFCC and its subsidiaries whereby RBI agreed to provide a revolving credit line to the Austrian Sub-Group in the sum of €62.5m, which was to be reduced to €40m by 5 January 2017. One of the conditions precedent of the Credit Agreement was that D2, as the parent company of the Group, should enter into a guarantee in favour of RBI in respect of the obligations of the Austrian Sub-Group under the Credit Agreement.

8. D2 provided the required guarantee ("the Guarantee") on the same day. The Guarantee is expressed to be governed by Austrian law and there is a provision within it to the effect that any dispute in connection with the Guarantee is to be resolved by arbitration under the rules of the Arbitral Centre of the Austrian Federal Economic Chamber in Vienna.

9. According to table 1 in the Supplemental Report of the forensic accountants, instructed by the Appellants, Lepage Marcil David, dated 8 January 2020 ("LMD2"), the standalone (i.e. unconsolidated) accounts of D2 as at 31 December 2016 (i.e. very shortly before the issue of the Guarantee), show that it had total assets of some 563.2m Canadian dollars (all references hereafter to $ are to Canadian dollars unless otherwise specified), including investments in subsidiaries of $554.5m, liabilities of $182.4m (comprising almost entirely amounts payable to its subsidiaries in the sum of $175.9m), and net assets (equity) therefore of some $380.8m.

10. In late 2016, MFC informed RBI of its plan to change its ultimate holding company from a company incorporated in British Columbia (D2) to one incorporated in the Cayman Islands. This was to be done pursuant to a Plan of Arrangement under Canadian law which would involve the approval of the relevant Canadian court. The Plan of Arrangement duly went ahead, having been approved by the court on 12 July 2017 and came into effect on 14 July. Pursuant to the Plan of Arrangement, D1 and D5 were incorporated in the Cayman Islands on 5 June 2017. On the Plan taking effect, shareholders in D2 were deemed to have transferred all their shares in D2 to D5 in exchange for receipt of shares in D1. The upshot was that D1 became the ultimate parent of the Group. It wholly owned D5, which in turn wholly owned D2. The shares of D1 were now listed on the New York Stock Exchange rather than the shares in D2. The former shareholders of D2 now held shares in D1 instead.

11. Reverting to events earlier in 2017, given the financial difficulties of MFCC, RBI transferred the MFC account to the bank's 'Special Exposures Management Group' (the "SEM Group"). Thereafter, further problems arose. On 10 May 2017, the Court appointed administrator of German Pellets informed MFCC that she was claiming €140m from MFCC on the basis that MFCC had continued to trade with German Pellets when it knew or suspected that German Pellets was insolvent and had received preferential creditor payments during the two years before the collapse of German Pellets. RBI was informed of this claim at a meeting on 29 May 2017. This has been referred to as the 'Voidance Claim'.

12. Given the potential damage to the financial position of the Austrian Sub-Group as a result of the Voidance Claim, further discussions took place between RBI and MFC with a view to a restructuring of the indebtedness of the Austrian Sub-Group to RBI. These negotiations began in June 2017 and continued into 2018. As part of the negotiations, RBI required MFC to undertake an independent business review, which was subsequently carried out by KPMG. Negotiations also took

place between MFCC and the administrator of German Pellets, who stated that she would prefer to proceed by way of a settlement than by litigation.

13. Over the next few weeks, MFC took the following actions in relation to D2:

(i) On 14 July 2017 – the same day as the Plan of Arrangement was approved by the Canadian court – D2 applied to change its domicile from British Columbia to the Marshall Islands and this re-domiciliation became effective on 18 July 2017.

(ii) On 21 August 2017, D2 declared an in-specie dividend in favour of its parent D5 ("the Dividend"). The Dividend was expressed to be in the sum of $247m and consisted of all of D2's shares in two companies, namely KHD Investments Limited and M Financial Corp, a company incorporated in Barbados. M Financial Corp in turn owned a number of subsidiaries.

(iii) On 23 August 2017, i.e. two days later, D2 entered into an agreement ("the Merchant Bank Transfer") to sell to D1 its shares in MFC Holding Limited (D3), a company registered in Malta which in turn owned a further Maltese company which carried on business as a merchant bank ("the Merchant Bank"). The consideration was expressed to be the assumption and set off of certain inter-company debts owed by D2.

(iv) On 29 September 2017, D5 sold its 100% shareholding in D2 to LTCM Asset Private Limited (D8), a company incorporated at the time in the Marshall Islands but apparently since redomiciled in Liberia. D8 is said to be owned by parties who are independent of MFC. Accordingly, from that date D2 was no longer a company within the Group. The consideration paid by D8 for its purchase of the shares in D2 was $2. This is because it was agreed between D5 and D8 that it was not intended that D2's interest in a mine known as the Scully Mine be transferred with D2 to D8 and accordingly the consideration payable by D8 for the acquisition of D2 excluded any consideration relating to the interest of D2 in the Scully Mine.

(v) On 26 October 2017, by a series of transactions set out in more detail below ("the Scully Mine Transfer"), D2 sold its interest in the Scully Mine to M

Financial Corp, which as a result of the Dividend was owned by D5 and is therefore ultimately a subsidiary of D1.

14. The proposed restructuring of the Austrian Sub-Group debt was never in fact agreed and RBI called in the outstanding debt from the Austrian Sub-Group under the Credit Agreement on 26 January 2018. It subsequently made demand under the Guarantee against D2 in the sum of approximately €40m on 21 February 2018. Later, in August 2018, MFCC became subject to insolvency proceedings in Austria.

15. All of the transactions referred to in paragraph 13 above took place at a time when negotiations were continuing about the restructuring of the Austrian Sub-Group debt, (which D2 had guaranteed) and were carried out without MFC informing RBI of what was occurring. The effect, according to RBI, is that, whilst when the Guarantee was given D2 was the parent company of the whole Group and had net assets of $380.8m, by October 2017, its value was $2 and it was no longer part of the Group. In effect, all of the significant assets of the Group had been stripped out of D2 and now rested in the ultimate ownership of D1 leaving D2 with no significant assets with which to meet its obligations under the Guarantee and the other guarantees which it had executed in favour of RBI. Where the context requires a distinction to be made, I shall refer to the group of companies in the ultimate ownership of D1 after the transactions referred to in paragraph 13 above as the 'new MFC Group'.

The proceedings and the judgment under appeal

16. Section 4(1) of the Fraudulent Dispositions Act ("the FDA") provides as follows:

> ***"(1) Subject to this Act, every disposition of property made with an intent to defraud and at an undervalue shall be voidable at the instance of a creditor thereby prejudiced."***

17. Section 2 defines an intent to defraud as *'An intention of a transferor wilfully to defeat an obligation owed to a creditor'* and *'obligation'* is defined as including a contingent liability. It therefore includes a potential liability under a guarantee.

18. Section 6 provides:

> ***"6. A disposition shall be set aside under this Act only to the extent necessary to satisfy the obligation to a creditor at whose instance the disposition has been set aside together with such costs as the Court may allow."***

19. RBI has instituted proceedings in the Grand Court alleging that each of the Dividend, the Merchant Bank Transfer and the Scully Mine Transfer (together "the Transactions") was made at an undervalue and with an intent to defeat the obligations owed by D2 to RBI pursuant to the Guarantee. It therefore seeks an order that each of the Transactions be set aside pursuant to section 4(1) of the FDA. It also alleges that the eight Defendants are liable for the tort of an unlawful means conspiracy, in that they conspired to act with the intention of injuring RBI by divesting D2 of substantially all of its assets so that such assets are no longer available to D2 to satisfy its obligations to RBI pursuant to the Guarantee.

20. On 30 September 2019, the Grand Court granted an ex parte freezing order against D1 prohibiting the disposal of certain specified assets. An inter partes hearing subsequently took place on 23, 24 and 29 January 2020. Parker J provided a ruling on 3 February 2020 that he would continue RBI's freezing order against D1 and would grant a similar order against D5. His reasons for that ruling were subsequently given in a judgment dated 7 July 2020 ("the judgment").

21. There was considerable evidence before the judge. RBI relied, inter alia, on five affidavits from Mr Dietmar Dellemann, Deputy Head of the SEM Group of RBI, (Dellemann 1-5) and four forensic accounting reports from Mr David Lawler of the firm Kroll, a division of Duff & Phelps (Lawler 1-4).

22. The Defendants relied on five affidavits from Mr Michael Smith (Smith 1-5), who is the chairman, and was until 2021 also the president and chief executive officer of D1 and was a director of D2 and its predecessors from 1986 to 2017. Of particular importance was his fifth affidavit (Smith 5). The Defendants also relied on two affidavits from Mr Samuel Morrow, the chief financial officer (and now as of 2021 also the chief executive officer and president) of D1 (Morrow 1-2). In terms of forensic accounting, the Defendants relied upon two reports from Mr Luc Marcil of Lepage Marcil David (LMD1 and 2).

23. Before the judge, D1 and D5 submitted that there was no good arguable case against them either under the FDA or for conspiracy. In particular, they submitted that there was no good arguable case of any intent to defraud on their part or that the Merchant Bank Transfer and the Scully Mine Transfer were carried out at an undervalue. They further disputed the validity of the Guarantee, which is an issue which will have to be resolved as between RBI and D2 in an Austrian arbitration.

24. Parker J rejected their submissions. In summary, he held as follows:

(i) RBI had a good arguable case (both for its claim under the FDA and for conspiracy) to the effect that the Transactions were carried out with an intent to defeat the contingent obligation owed by D2 to RBI pursuant to the Guarantee and were also carried out at an undervalue.

(ii) There was a real risk of dissipation if a freezing order was not granted.

(iii) The fact that the validity of the Guarantee would have to be established pursuant to an Austrian arbitration as between RBI and D2 was no reason not to grant a freezing order.

(iv) In the particular circumstances of this case, there was no need to impose a cap on the value of assets which were made subject to the freezing order.

Grounds of appeal

25. The Appellants rely on seven grounds of appeal:

(i) The judge failed to have regard to the fact that there was no extrinsic evidence of dishonesty on the part of the Appellants and there is a wealth of evidence which was consistent only with honesty.

(ii) When holding that the Dividend declared in August 2017 was arguably fraudulent, the judge misdirected himself as to the evidence in relation to the payment of the Dividend.

(iii) When addressing the other Transactions (i.e. the Merchant Bank Transfer and the Scully Mine Transfer) which were allegedly at an undervalue, the judge failed to have regard to the evidence (and in particular evidence from the Appellants' expert) that showed that the transfers were for full value.

(iv) In the premises, the judge wrongly found that there was a good arguable case that the Appellants had entered into fraudulent dispositions within the meaning of the FDA and had entered into a conspiracy to injure by using unlawful means.

(v) The judge wrongly found that without an injunction there was a real risk of dissipation of assets.

(vi) The judge was wrong to grant the injunction because it was ultimately in support of an arbitration that RBI had not taken steps to pursue and did not intend to pursue until after the present claims were resolved.

(vii) If, contrary to the Appellants' contention, it was appropriate to grant an injunction, the judge wrongly failed to cap the injunction at a figure of around €44m.

26. I shall, in due course, consider each of these grounds in turn, but it is first necessary to consider an application by the Appellants to adduce evidence on this appeal which was not adduced before the judge.

Application to adduce additional evidence

27. Following the issue of the judgment, the following affidavits were served:

(i) On 6 October 2020, a ninth affidavit from Mr Morrow (Morrow 9).

(ii) On 9 December 2020, in response, an eleventh affidavit from Mr Dellemann (Dellemann 11).

(iii) On 21 December 2020, in reply to Dellemann 11, an eleventh affidavit from Mr Morrow (Morrow 11).

The Appellants seek leave to adduce Morrow 9 and Morrow 11 in evidence on this appeal and accept that, if leave is granted, Dellemann 11 should also be admitted.

28. Morrow 9 and Morrow 11 do not deal with matters which have arisen since the hearing before the judge. As Mr Morrow states in his affidavit dated 17 August 2021 in support of the application to adduce additional evidence:

> ***"10. Although some of the material contained in Morrow 9 and 11 was before the Grand Court at the Hearing, it was not included in a coherent narrative explaining the Appellants' conduct. In the circumstances, the Defendants considered it necessary to place such a narrative before the Court particularly as the Judge indicated in the 7 July Judgment that, in his view, the Defendants had failed to advance a positive case 'explaining the purpose and legitimacy of the transactions and conduct complained of'."***

29. In essence, Morrow 9 and Morrow 11 seek to fill gaps in the evidence which the judge identified. In particular, they give more detailed evidence of the communications and discussions which took place in 2016 and 2017 between RBI and MFC in relation to the Austrian Sub-Group indebtedness, the re-domiciliation and sale of D2, the payment of the Dividend and the Merchant Bank Transfer and Scully Mine Transfer. They also give more detailed explanation as to why the validity of the Guarantee is challenged. However, it is clear that all of this was available to the Appellants at the time of the hearing before the judge and could have been adduced at that time.

30. The manner in which the Appellants sought to adduce this additional evidence is most irregular. Despite the fact that the affidavits were sworn for other purposes in

the main proceedings as long ago as the end of 2020 and the appeal has been on foot since July 2020, the summons for leave to adduce this additional evidence was only filed on 6 July 2021. The Appellants' skeleton in support of the appeal was filed the same day. The skeleton deals briefly with the application to adduce additional evidence at paras 10 -14 by reference to the decision of this Court in Columbraria Limited v Beteta [2000] CILR Note 2 and, having done so, the rest of the skeleton assumes that the application has been successful, in that it refers to and relies heavily on the contents of Morrow 9 and Morrow 11.

31. I have to say that this was a most unsatisfactory method of proceeding. If the application were to be refused, it would be extraordinarily difficult to disentangle those parts of the Appellants' argument which rely on Morrow 9 or Morrow 11 from those parts which are referable to the material before the judge, mainly Smith 5. It is not acceptable for an appellant to assume that an application to adduce additional evidence will be successful and to frame its arguments entirely by reference to the additional evidence. What should have occurred is that the Appellants' skeleton should have been in two parts, with one part referring to the material before the judge and the other written on the assumption that the application to adduce further evidence was successful. The Court would then have been in a position easily to appreciate the relevant arguments of the Appellants by reference to whether or not it had granted the application for additional evidence.

32. Turning to the correct approach for considering whether to allow additional evidence on an interlocutory appeal, Mr Wardell placed considerable reliance on the decision in Columbraria. The effect of that decision is summarised in CILR Note 2a in the following terms:

> ***"The Court of Appeal has an unfettered discretion under the Court of Appeal Rules 1987, r. 17(2) to hear fresh evidence on an appeal if there has yet been no trial of the substantive issues in the case. Accordingly, if the evidence is relevant and would not unduly prejudice the party against whom it is to be tendered, the court may***

give leave to admit fresh evidence on an appeal from a decision of the Grand Court concerning the proper forum for the trial of the case. However, after a trial of the merits of the case, the court's discretion is subject to the more restrictive provisions of O.59, r.10 of the Rules of the Supreme Court, and fresh evidence may be adduced only on 'special grounds' (Ladd v Marshall, [1954] 1 WLR 1489, applied)."

33. The paragraph of the judgment of Georges JA on which that note is based reads as follows:

> ***"Where the issue decided is in the area of procedural matters the principles guiding the discretion of the Court in exercising its powers under our local rules are whether the evidence is relevant and whether the party against whom such evidence is tendered would be prejudiced by the granting of leave to adduce it."***

34. As can be seen, the clear implication of the judgment is that where the evidence is relevant and where there would be no prejudice to the other party, leave is likely to be granted for further evidence on an interlocutory matter.

35. However, that decision is some 20 years old and since then, there have been considerable changes in the way in which parties are expected to conduct litigation. In my judgment, the comparatively relaxed approach to the introduction of further evidence on appeal in interlocutory matters reflected in Columbraria is no longer appropriate. I reach this conclusion for two main reasons.

36. First, the concept of the overriding objective was introduced into the Grand Court Rules in 2003. Pursuant to paragraph 2.1 of the preamble to the Rules, the Grand Court must seek to give effect to the overriding objective when exercising any discretion. In my view, this Court should similarly seek to give effect to the overriding objective.

37. I do not consider that the approach in Columbraria is consistent with the overriding objective. It is incumbent upon a party to put its best foot forward before the Grand Court and to produce all the relevant evidence which it seeks to rely upon in support of its case. This is as applicable to hearings on interlocutory matters such as freezing orders, forum disputes etc as it is to full trials. A hearing before the Grand Court is not a dry run for an appeal, with a party seeking on appeal to cure any deficiencies in the material produced before the Grand Court. As Lewison LJ stated in Fage UK Limited v Chobani UK Limited [2014] EWCA Civ 5 at [114] *"The trial is not a dress rehearsal. It is the first and last night of the show"*.

38. Secondly, the judgment of Georges JA in Columbraria referred to the fact that Rule 17(2) of the Court of Appeal Rules was in broader terms than the equivalent provision of Order 59 Rule 10 of the Rules of the Supreme Court in England and Wales, with its reference to *'special grounds'*.

39. Rule 17(2) of the Court of Appeal Rules in this jurisdiction remains in the same form as it was in 2000, namely:

> ***"(2) The Court shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in Court, by affidavit or by deposition taken before an examiner or commissioner."***

40. However, the position in England and Wales is now governed by CPR Rule 52.21(2) which provides:

> ***"(2) Unless it orders otherwise, the appeal court will not receive:***
> ***(a) oral evidence; or***
> ***(b) evidence which was not before the lower court."***

There is therefore now a general discretion in the English Court of Appeal to allow additional evidence on appeal in broadly similar terms to the position in this jurisdiction.

41. However, the courts in England and Wales have made it clear that the principles set out in Ladd v Marshall [1954] 1 WLR 1489 at 1491 are still relevant when considering how to exercise that discretion. The position is conveniently summarised in the judgment of Laws LJ in Terluk v Berezovsky [2011] EWCA Civ 1534 at [31] – [32] in the following terms:

> ***"31. It is convenient first to consider the law relating to the deployment of fresh evidence in civil appeals. The locus classicus is Ladd v Marshall [1954] 1 WLR 1489, 1491 where three criteria were articulated by Denning LJ as he then was: (1) the evidence could not with reasonable diligence have been obtained for use at the trial; (2) the evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive); and (3) the evidence is apparently credible though it need not be incontrovertible.***
>
> ***32. The admission of fresh evidence in this court is now addressed in the CPR. CPR 52.11(2) provides in part:***
>
> > ***"Unless it orders otherwise, the Appeal Court will not receive… (b) evidence which was not before the lower court".***
>
> ***The impact of the CPR on the established approach set out in Ladd v Marshall has been considered in a number of cases. It is clear that the discretion expressed in CPR 52.11(2)(b) has to be exercised in light of the overriding objective of doing justice (see for example Hertfordshire Investments Limited v Bubb [2000] 1 WLR 2318 per Hale LJ as she then was at paragraph 35, Sharab v Al-Sud [2009] EWCA Civ 353 per Richards LJ at paragraph 52). The Ladd v Marshall criteria remain important ("powerful persuasive authority") but do not place the court in a straightjacket (Hamilton v Al Fayed (No 4) [2001] EMLR 15 per Lord Philips MR as he then was at paragraph 11). The learning shows, in my judgment, that the***

> ***Ladd v Marshall criteria are no longer primary rules, effectively constitutive of the court's power to admit fresh evidence; the primary rule is given by the discretion expressed in CPR 52.11(2)(b) coupled with the duty to exercise it in accordance with the overriding objective. However the old criteria effectively occupy the field of relevant considerations to which the court must have regard in deciding whether in any given case the discretion should be exercised to admit the proffered evidence. It seems to me with respect that so much was indicated by my Lord the Chancellor (then Vice-Chancellor) in Banks v Cox (17 July 2000) paragraphs 40 – 41);***
>
> > ***"In my view, the principles reflected in the rules in Ladd v Marshall remain relevant to any application for permission to rely on further evidence, not as a rule, but as matters which must necessarily be considered in an exercise of the discretion whether or not to permit an appellant to rely on evidence not before the Court below.""***

42. In my judgment, that approach is now required in order to give effect to the overriding objective and is equally applicable in this jurisdiction. The approach is applicable to appeals in interlocutory matters (such as freezing orders, applications to serve out of the jurisdiction etc) as well as appeals after a full trial. The criteria in Ladd v Marshall are not a form of jurisdictional gateway, but they are questions which this Court should consider when deciding how to exercise the discretion conferred by Rule 17(2).

43. Applying that approach to the present application, the Appellants have put forward no reason as to why the material in Morrow 9 and Morrow 11 could not have been adduced before the judge. It was clearly available for use at that time because it all relates to events which occurred and were known to Mr Morrow prior to the hearing. It is simply a case of the Appellants wishing to put forward their evidence in a rather better form than it was presented before the judge and seeking to remedy deficiencies in that evidence which were identified by the judge.

44. That is not an acceptable reason for wishing to adduce further evidence and had the matter rested there, I would have rejected the application because of the Appellants' complete failure to satisfy the first of the Ladd v Marshall criteria. As I have already indicated, the need to comply with the overriding objective means that parties are expected to produce all the evidence which they seek to rely upon at first instance and not simply make an attempt at doing rather better on appeal.

45. However, for reasons referred to later in this judgment, I have concluded that the judge erred in certain respects and that this Court must exercise its own discretion on the merits of the appeal. Given that (i) we shall be exercising our own discretion rather than simply reviewing that of the judge (ii) the fact that, because of the way in which the Appellants have presented this appeal, it will be difficult, if not impossible, to extract from the Appellants' submissions those parts which are referable to the original evidence and those parts which are referable to the further evidence – the Respondents very fairly described the resulting position as a *'mess'* at para 31 of their skeleton – and (iii) that no real prejudice will be suffered by RBI as it has been aware of the additional evidence since late 2020 and has responded by means of Dellemann 11, I think that the best course in the unusual circumstances of the present case is to allow the further evidence so that the Court can exercise its discretion having regard to all the material currently before it.

46. There are two further applications to adduce additional evidence. By summons dated 6 August 2021, RBI seeks leave to rely on certain specified paragraphs of the thirteenth affidavit of Mr Dellemann (Dellemann 13) and by summons dated 12 August 2021, the Appellants seek to rely on the thirteenth affidavit of Mr Morrow (Morrow 13). Both of these deal with matters which have occurred since the hearing before Parker J and are relevant to the issues which we have to consider. We therefore granted leave at the outset of the hearing before us for this material to be adduced in evidence.

The relevant law – a good arguable case

47. It is well established that, in order to grant a freezing order, the court must be satisfied that:

(i) the applicant for the order has a good arguable case on the merits of his claim;

(ii) there is a real risk that any judgment would go unsatisfied by reason of the dissipation of his assets by the defendant unless he is restrained by the court from disposing of them; and

(iii) it would be just and convenient in all the circumstances to grant the freezing order.

48. Grounds 1 – 4 of the Grounds of Appeal are directed towards establishing that RBI does not have a good arguable case in relation to its claims under the FDA and for conspiracy. The question then arises as to what is meant by a *'good arguable case'*.

49. It is an expression that is used in a number of contexts, including applications for freezing injunctions and assessing whether a plaintiff can satisfy a jurisdictional gateway for leave to serve proceedings out of the jurisdiction. In my view, the most helpful summary of what is meant by this expression is to be found in the judgment of Mustill J (as he then was) in The Niedersachsen [1983] 2 Lloyd's Rep 600 at 605 which has been followed and applied many times since:

> ***"I consider that the right course is to adopt the test of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than fifty per cent chance of success."***

50. As Green LJ said in the Court of Appeal of England and Wales in Kaefer v AMS [2019] 3 All ER 979 at [59], a test intended to be straightforward *"has become befuddled by 'glosses', glosses upon glosses, 'explications' and 'reformulations'"*.

The most recent and authoritative elaboration of the test of a good arguable case is to be found in the judgment of Lord Sumption in Brownlie v Four Seasons Holdings Inc [2018] 1 WLR 192 at [7] where, having referred to the observation of Waller LJ in Canada Trust Co v Stolzenberg (No 2) [1998] 1 WLR 547 to the effect that *'good arguable case'* reflects that one side has a much better argument on the material available, Lord Sumption said as follows:

> ***"The reference to 'a much better argument on the material available' is not a reversion to the civil burden of proof… What is meant is (i)that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word 'much', which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."***

51. In my judgment, it is hard to improve on the language used by Mustill J in The Niedersachsen in order to obtain a clear impression of what the court is looking for when it considers whether a plaintiff has a good arguable case and I note that, in the context of Norwich Pharmacal relief, this Court has also recently adopted the statement of Mustill J as to the meaning of a good arguable case; see the judgment of Martin JA in Essar Global Fund Limited v Arcelormittal USA LLC (CICA Appeal 15 of 2019, 3rd May 2021). However, if there is to be any elaboration of the test, it is to be found in Lord Sumption's formulation in Brownlie referred to in the preceding paragraph.

52. What the approach in Brownlie clearly requires – and this is also implicit in Mustill J's formulation – is that the court must take into account any evidence and

submissions put forward by the defendant in an attempt to show that there is not a good arguable case. The court cannot simply proceed on the basis of the plaintiff's case without considering the defendant's case. However, as is well established, the court is not to conduct a form of mini trial and try to resolve conflicts of evidence or make findings of fact. Thus at (iii), Lord Sumption envisaged that it may well be the case that the court is simply unable to decide who has the better case on the basis of the material before it and the court must then consider whether the plaintiff has a good arguable case in the sense of a plausible (albeit contested) evidential basis for it; see also Lakatamia Shipping Company Limited v Morimoto [2019] EWCA Civ 2203 per Haddon-Cave LJ at [38] in the context of freezing orders.

Approach on appeal

53. It is well established that a decision whether to grant an interlocutory order such as a freezing order is a discretionary decision for the first instance judge and an appellate court may only interfere on limited grounds as set out, for example, in Hadmor Productions Limited v Hamilton [1983] AC 191 at 220A – E, per Lord Diplock. It is not sufficient that the members of the appellate court would have exercised their discretion differently.

54. Similarly, as part of considering whether to grant a freezing order, a judge may have to reach an evaluative decision such as whether there is a good arguable case. In those circumstances, the court will only interfere with a finding as to whether a good arguable case exists where it is plain that the judge below was wrong; see Lakatamia at [78] per Haddon-Cave LJ.

55. As RBI accepted at para 5 of its skeleton argument, a demonstrable failure by the judge to consider relevant evidence that was before him is one of the matters which may entitle an appellate court to set aside the judge's exercise of its discretion and re-exercise the discretion itself.

56. A key piece of evidence much relied upon by the Appellants before the judge was the evidence of their forensic accounting expert from LMD. This was particularly relevant to the question of whether there was a good arguable case. Despite numerous references in the judgment to the evidence of Mr Lawler, RBI's forensic accounting expert, there is not a single reference in the judgment to the evidence from LMD. Whilst it is of course not necessary for a judge in his reasons to refer to all the evidence which he hears or to every witness, it seems to me that the failure to refer even once to what was said by LMD in opposition to the evidence of Mr Lawler does raise a real possibility that the judge failed to consider LMD's evidence.

57. In my view, therefore, this is one of those cases where this Court should reconsider the matter and exercise its own judgment as to whether a good arguable case is made out rather than simply reviewing the reasonableness of the judge's conclusion.

Grounds of appeal

58. With that introduction, I turn to consider the grounds of appeal in turn.

Ground 1 – no fraudulent intent

59. Ground 1 is in the following terms:

> ***"The judge failed to have regard to the fact that there was no extrinsic evidence of dishonesty on the part of the Appellants and that there was a wealth of evidence which was consistent only with honesty on the part of the Appellants."***

60. It is an essential element of the claim under the FDA and in conspiracy that the Transactions, namely the Dividend, the Merchant Bank Transfer and the Scully Mine Transfer, were carried out with an intent to defraud, in the sense of an

intention wilfully to defeat the contingent obligation owed by D2 to RBI under the Guarantee. Ground 1 therefore falls to be considered in relation to all the Transactions.

61. As already mentioned, it is not for a court considering whether there is a good arguable case for the purposes of a freezing order to conduct a mini trial. However, both before the judge and before this Court, the parties have filed detailed affidavit evidence seeking to show that there is or is not (as the case may be) a good arguable case. It is necessary therefore to summarise the key material upon which they respectively rely, but I propose to do so only to the extent necessary to explain my decision. However, I have considered all the evidence and submissions put before us.

RBI's submissions

62. On behalf of RBI, Mr Penny took us in some detail through a chronology of significant events with a view to showing that there was clearly an intention to defraud. What follows is a very brief summary of what I consider to be the key elements of his submission, the overarching nature of which was that the Transactions all took place at a time when negotiations between the parties were taking place with a view to the restructuring of the debts owed by the Austrian Sub-Group, which debts were guaranteed by D2, in circumstances where the effect of the Transactions was to extract all the significant value in D2 into the new MFC Group under D1 so as to leave RBI with a guarantee issued by a worthless company which was no longer even in the ownership of MFC; and all of this without MFC at any stage informing RBI of what it was doing. Indeed, he submitted that it was not just a case of non-disclosure. The Defendants had misrepresented the position in various documents and meetings and had been in breach of certain disclosure obligations imposed by the terms of the Guarantee. Emphasised passages in the following paragraphs are those passages upon which Mr Penny placed particular reliance.

63. On 31 January 2017, MFC failed to make a payment on time (although made shortly afterwards) because of liquidity issues. This caused RBI to transfer MFC to its SEM Group as referred to earlier. Their credit rating was downgraded by RBI[1].

64. At a meeting shortly afterwards on 9 February attended by Mr Smith and Mr Morrow with representatives of RBI, Mr Smith and Mr Morrow are asserted to have said according to the note of the meeting[2]:

> ***"According to MFC, the Group parent, MFC Bank Corp Limited, currently has equity of C$250m and a total of C$130m guarantees outstanding to third parties."***

Mr Penny submitted that this assertion was quite inconsistent with the assertion of Mr Smith in Smith 5[3] and in the Defendants' pleading that there was an understanding between RBI and MFC that the Guarantee would never be called upon; that it was really just a piece of paper to allow RBI to meeting certain regulatory and internal requirements and was in effect a sham.

65. In March 2017, the annual report and accounts for 2016 of MFC were released[4] in which it was stated:

> ***"We announced today a Plan of Arrangement (the 'Plan') that is designed to improve our corporate structure, reduce expenses and increase our global exposure. MFC Bancorp Ltd, a Canadian company will not change, just the ultimate parent company."***

66. At a meeting on 19 April 2017 between RBI and MFCC, with Mr Morrow in attendance, it was noted in the minutes that, despite the promise of MFC to deliver

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[1] RB6/1880

[2] RB6/1884

[3] Smith 5, para 114.5

[4] RB9/3786

a reduction plan, MFC did not present RBI with a concrete proposal to reduce the €40m working capital facility. The minutes[5] noted the Plan of Arrangement stating *'MFC plans to move its holding company from Canada to Cayman Islands, with the Canadian holding company* [i.e. D2] *becoming the only participation of the Cayman Islands entity. Stated reason is tax and regulatory issues….'*.

67. In early May 2017, MFC sent RBI a document setting out details of the Plan of Arrangement[6]. The memo repeats the wording about MFC Bancorp, a Canadian company, not changing, only the parent company and asserts that MFC (D2) will become a wholly owned subsidiary of new MFC (D1). The memo goes on to state:

> ***"The guarantor of MFC Bancorp's debt obligations will not change, only the ultimate parent company. We will not make any additional changes (i.e. reporting currency) and our New York Stock Exchange listing under the existing symbol (MFCB) will be continuous without interruption or changes."***

On the same page there is a chart of the corporate structure both before and after the Plan of Arrangement and the only change shown is the insertion of D1 above D2; the subsidiaries of D2 are shown without alteration both before and after the Plan of Arrangement.

68. On 29 May 2017, a meeting took place between RBI and MFC, including Mr Smith and Mr Morrow for MFC, where RBI was informed of the Voidance Claim. This was clearly a matter of some concern because Dellemann 1 states at para 127 that, as a result of these developments and in order to protect RBI, RBI notified MFC's lawyers that any further withdrawals were halted and the facilities were frozen. Mr Penny submits that there was by this time considerable pressure on MFC in relation to the facilities from RBI.

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[5] RB6/1892

[6] RB6/1907

69. The Court was referred to a number of the documents circulated in connection with the Plan of Arrangement but it is not necessary to refer to them. It is accepted that in none of these documents was any reference made to the fact that D2 was to cease being a Canadian company but was instead to be redomiciled in the Marshall Islands. The application for re-domiciliation was made on 14 July 2017, the same day as the Plan of Arrangement came into effect following approval by the Supreme Court of British Columbia on 12 July and the re-domiciliation became effective on 18 July. At about this time, D2 also changed its name to 0778539 BC Ltd.

70. On about 19 June, Mr Smith told Mr Dellemann that MFC was considering a restructuring of the Austrian Sub-Group debts, to which RBI's response was that it would need to have an independent business review as the basis for any kind of restructuring. There were various exchanges thereafter between the parties as to the identity and nature of the independent business review ("IBR"), in particular whether it would be of the Group as a whole or limited to MFCC and the Austrian Sub-Group.

71. Whilst these exchanges were taking place, the first Transaction took place, namely the declaration of the Dividend by D2 on 21 August 2017. This distributed assets of some $247m to its immediate parent D5.

72. Two days later, on 23 August 2017, the Merchant Bank Transfer took place with the consequence that the Merchant Bank was no longer ultimately owned by D2. None of this was communicated to RBI or to KPMG, which was to undertake the IBR.

73. The engagement letter with KPMG is dated 28 August and KPMG said that they would start work the same day.

74. On 18 September 2017[7], Mr Morrow sent an email to Mr Dellemann attaching a memo dated July 2017 purporting to show the effects of the Plan of Arrangement. On page two of the memo there is an organisational structure as at 30 June and an organisational structure immediately after the Plan of Arrangement and this shows D2 holding the subsidiaries as at 30 June and D2 continuing to hold the subsidiaries after the Plan of Arrangement, albeit D2 is now owned by D5 which is in turn owned by D1. Mr Penny submits that that was a clear representation by Mr Morrow as at 18 September that this was the position. No mention was made of the re-domiciliation of D2, of the fact that a number of direct and indirect subsidiaries had been transferred out of D2 as a result of the Dividend or that the Merchant Bank had also been transferred out of the ownership of D2 as a result of the Merchant Bank Transfer. Nor was any mention made of the fact that some ten days later, D2 was to be sold out of the group by D5 to D8 for $2.

75. On 29 September 2017, D2 was sold by D5 to D8 for $2 without any notification to RBI.

76. Shortly after that, on 6 October, Mr Morrow emailed RBI setting out terms of an in principle agreement[8]. This involved RBI acting as agent for the pool of proceeds from all assets of MFCC and its subsidiaries on behalf of creditors. The envisaged process and timeline thereafter was that KPMG should prepare its draft report which would be reviewed by RBI and subsequently finalised. Thereafter there would be a global creditors' meeting, followed by signing of a global settlement agreement. The agreement in principle also envisaged certain German industrial real estate owned by MFC (but not the Austrian Sub-Group) being used as security for the expected recoveries. I refer to this later as it is a point much relied upon by Mr Wardell. Mr Dellemann replied on 9 October confirming that the email was in line with RBI's understanding but stating that his confirmation of this common understanding could not be seen as a formal agreement. Any final agreement would

[7] RB7/2439

[8] RB7/2441

be subject to internal approval, approval of legal documentation and other matters[9]. Mr Penny pointed out that this acceptance of an agreement in principle was reached by RBI in ignorance of the fact that, by this time, D2 had been sold out of MFC and no longer owned most of the assets which it had owned at the time the Guarantee was given.

77. KPMG sent its IBR on the Austrian Sub-Group to Mr Morrow at D1 on 20 October 2017[10]. The covering letter made it clear that KPMG had obtained detailed information from Mr Morrow, amongst others, and that the report relied upon the information made available by MFC entities. It further stated that KPMG had reviewed only the documentation that was made available by MFC.

78. The financial and structural information contained in the IBR was stated to be as at 30 June 2017. Mr Penny referred the Court to a number of passages in the IBR. Thus:

(i) In the Executive Summary on page 9, it refers to the facilities outstanding in respect of the Austrian Sub-Group and states '*all facilities are guaranteed by MFC Bancorp Limited (Canada)'* i.e. D2. D2 was, of course, by now no longer incorporated in Canada.

(ii) The chart of the group legal structure on page 14 showed M Financial Corp as a 100% subsidiary of D2. This was, of course, no longer true as M Financial Corp had been distributed by D2 to D5 as part of the Dividend.

(iii) On page 82 reference is made to the fact that MFC Bancorp Limited, Canada (D2) has provided guarantees for various financial institutions for bank loans provided to subsidiaries of the Group and, more specifically, on page 86, reference is made to the fact that D2, as holding company, has guaranteed the liabilities of MFCC to, inter alia, RBI. Mr Penny submitted that, given this information had been provided by MFC, it was quite inconsistent with a view that the Guarantee was simply a sham document

[9] RB7/2440

[10] RB7/2446

which would never be called upon. It was also misleading in that it gave the impression that D2 was still the holding company whereas, by this time, it was no longer part of MFC and virtually all of its assets had been transferred elsewhere.

In essence, Mr Penny submitted that this was a thoroughly misleading document which misrepresented the position. It was known to MFC that it was going to be relied upon by RBI in relation to the negotiations on the restructuring, yet the content of the report bore little relation to the position of D2 in October 2017, when RBI was considering whether to agree to the restructuring.

79. KPMG prepared a second report which, according to Mr Penny, was given to RBI on 25 October 2017, which was the day before the Scully Mine Transfer. It was prepared for RBI but on instructions received from MFC and it was intended as an overview on the possible operation of the Companies Creditors Arrangement Act (CCAA) in Canada, which enables a debtor to apply for a form of protection on insolvency[11]. At page 2 of the report it is stated:

> ***"An Austrian bank (the "Bank") is the secured lender to Austrian subsidiaries (the "Companies"). The guarantor of the credit facilities is the holding company (the "Parent") incorporated in the province of British Columbia under the Business Corporations Act (British Columbia)…. The Parent's principal assets are investments in various subsidiaries."***

Mr Penny submitted that this, too, was highly misleading in that 'the Parent' (i.e. D2), was no longer incorporated in British Columbia and had divested itself of all its material subsidiaries (if one included the Scully Mine Transfer which was to take place the next day). The information provided by MFC to KPMG was again inconsistent with the contention that the Guarantee was a sham.

[11] RB7/255

80. On 26 October, D2 entered into the Scully Mine Transfer whereby it disposed of its interest in the Scully Mine to M Financial Corp.

81. On 30 October, D2 entered into a settlement agreement with Tacora Resources Inc, which was the sub-lessor under the lease of the Scully Mine. The Tacora settlement agreement has not been produced by the Appellants but, according to Mr Penny, the agreement enabled the mine, which had not been operating for a while, to begin operating again. He submitted that this would have had an immediate effect on the value of D2's interest in the mine; it would immediately be greater than the value in the accounts, which was the value at which it was sold to M Financial Corp.

82. On 31 October 2017[12], Mr Dellemann emailed Mr Morrow to ask for the two latest financial statements of the Guarantor (i.e. D2) on a single entity basis, i.e. not consolidated accounts. Mr Morrow replied on 2 November[13] enclosing financial statements of D2 for the periods ending 31 December 2016 and 30 June 2017. He made no mention of the fact that D2 was no longer part of MFC and had, in any event, disposed of most of the assets shown in those two financial statements. The financial statements sent showed net shareholders' equity for D2 of $380.8m at 31 December 2016 and $399m at 30 June 2017.

83. At a series of individual meetings with creditors of the Austrian Sub-Group held on 6 December 2017, after which a joint note of those meetings was circulated, it appears that UniCredit, one of the other creditors, raised a query about the location of D2. The relevant part of the memo concerning the meeting[14] reads as follows:

> ***"Has the registered office (of the guarantor) been relocated to Marshall Islands? What is the position of the company in the overall group chart? Is there a balance sheet information of the***

[12] RB7/1052

[13] RB7/1052

[14] RB7/2583

guarantor? Is the company owner of all subsidiaries as it was before the arrangement?"

According to RBI, this was the first indication it had received that D2 might have been redomiciled from British Columbia to the Marshall Islands.

84. On 14 December 2017, Mr Dellemann wrote to the Austrian Sub-Group's German lawyers asking whether it was correct that the guarantor had moved its registered office from Canada to the Marshall Islands and seeking a written statement on why this step was taken and what effect it had on the guarantor's means and/or the value of the Guarantee[15]. He further stated that the bank proposed a standstill agreement, although one of the conditions would be that KPMG should be commissioned to demonstrate the value of the Guarantee and/or the financial circumstances of the guarantor.

85. On 12 January 2018, RBI's Canadian lawyers established from public records that D2 had indeed been redomiciled.

86. On 26 January 2018, RBI terminated the credit facilities to the Austrian Sub-Group and on 21 February 2018 RBI made formal written demand on D2 pursuant to the Guarantee. On the same date it also made formal demand on various other guarantees which D2 had given in respect of debts of the Group. The total amount due under the various guarantees (including the Guarantee) is said to be some $130m.

87. On 13 February 2018, Mr Dellemann wrote to Mr Smith[16] to say that he understood that MFCC wished to recommence negotiations with its Austrian creditors, but stating that any proposal from MFCC would have to take into account the bank's latest position with regard to the parent guarantee.

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[15] RB7/2586

[16] RB11/5538

88. On 26 February, Mr Smith sent RBI a memo containing corporate information about the Group as at 30 September 2017[17]. This included references to assets which, unknown to RBI, had been paid out in the Dividend, the Merchant Bank Transfer and the Scully Mine Transfer. It made no mention of the fact that these assets were no longer owned by D2 and were therefore not available to satisfy the Guarantee.

89. Mr Penny took us to various further exchanges between RBI and MFC which I do not think it necessary to record in this judgment. However, following supply of MFC's 2017 annual report, RBI sent Mr Smith a list of questions about that report. The questions were answered in a memo from Mr Smith to Mr Dellemann dated 1 May 2018[18] and I would set out the following extracts which were relied upon by Mr Penny as indicating the attitude of MFC:

> ***"Q1: Is the Austrian Sub-Group not part of the group anymore? MFC Corporate Services GmbH is not any more mentioned in the list of 'significant subsidiaries' and on page 98 it is mentioned that 'Effective October 1 2017, the Group disposed of certain subsidiaries, including certain commodities trading subsidiaries in Europe'. Does this mean that MFC Corporate Services GmbH was disposed of? How was that done? Could you please inform us who is the current ultimate beneficial owner of MFC Corporate Service GmbH?***
>
> ***Ans: We have previously discussed on multiple occasions the winners and losers on the Possibility and Marginal lists. These were given to you with the business logic for all. All your questions were answered and a review of each company occurred. Suggest you look back on your notes. We have referred to this several times with our last group call and it was again confirmed by myself.***
>
> ***Your concern should be if there is any net value lost with the group. All transactions are at fair value. No related party transactions, see Note 21 of Financial Statements…..***

[17] RB7/2785

[18] RB8/3100

…

Q3: ***On page 35, it is mentioned that 'as at December 31 2017, we had no unrecorded contingent liabilities relating to outstanding guarantees issued to our trade and financing partners in the normal course of our merchant banking activities'. How does this statement go in line with the guarantees which were given as collateral to the various loans? Does it mean that the guarantor is not part of the group anymore?***

Ans: ***Our merchant banking segment includes our marketing activities, captive supply assets, financial services, proprietary investing activities, hydrocarbon interests and iron ore interest. Under our business model, such activities are generally interlinked. For example, we may market products sourced from captive supply assets, which include interests acquired through our proprietary investing or we would provide financial services to the end customers of our marketing activities. Our marketing activities, including the sale of products from our captive supply assets, represented the majority of our revenues in 2017.***

We make proprietary investments as part of our overall merchant banking activities and we seek to realise gains on such investments over time. We seek to participate in many industries, emphasising those business opportunities where the perceived intrinsic value is not properly recognised, often as a result of financial and other distress affecting them. These investments can take many forms and can include acquiring entire businesses or portions thereof, investing in equity or investing in existing indebtedness (secured and unsecured) of businesses or in new equity or debt issues. These activities are generally not passive. The structure of each of these opportunities is tailored to each individual transaction.

This information provided re: contingent liabilities in the normal course of our merchant banking business is in accordance with the various IFRS standards.

Your concern should be if there is any net value loss within the group. All transactions are at fair value. No related party transactions, see Note 21 of Financial Statements."

90. Mr Penny described this as amounting to no attempt whatsoever to answer any of the legitimate questions raised by RBI and to just giving the bank the brush off. I would agree.

91. Mr Penny informed us that this was really the end of communications between the parties. The bank instructed its legal team in 2019. Subsequently Mr Lawler reviewed the financial statements of various MFC companies and concluded that D2 had been transferred out of the Group and that assets had been transferred out of D2 into the new MFC Group. This was summarised in Lawler 1 dated 23 August 2019 and caused RBI to launch the present proceedings.

92. Mr Penny submitted that this chronology of events, supported as it was by contemporaneous documents, clearly amounted to a good arguable case that, when D2 divested itself of its assets by means of the Dividend, the Merchant Bank Transfer and the Scully Mine Transfer, it did so with an intention to defeat the claims of RBI under the Guarantee.

(ii) The Appellants' submissions

93. In response, Mr Wardell submitted that there was no extrinsic evidence of dishonesty on the part of the Appellants and there was much evidence which was consistent only with honesty. He referred, inter alia, to the following matters.

94. The parties had a long standing business relationship which dated back to 2001 and there was no suggestion of any prior episode of allegedly improper dealings or conduct on the part of MFC. On the contrary, RBI's own evidence supported the fact that the relationship between them was extremely good. For example, in paras 70 and 71 of Dellemann 1, Mr Dellemann said:

> ***"70. …This*** [i.e. RBI's assessment in 2016 that the group's underlying financial performance was still relatively strong] ***was bolstered by the MFC Group's long-standing customer relationship with RBI and its ongoing and very open and professional information policy, behaving in a transparent fashion with RBI. Consequently, RBI was prepared to go***

along with the MFC Group's proposals for reducing its liabilities to RBI in a structured manner.

71. The MFC Group continued to cooperate with RBI to reduce its exposure to RBI throughout 2016. At a meeting on 13 December 2016, RBI was informed that the MFC Group was fully on track with its 2016 plan, which involved continuing to sell a number of unprofitable businesses and drastically reducing its debt…."

To like effect, was paragraph 9 of the affidavit of Miss Zimmermann, an executive director at RBI[19].

95. In elaboration of the above point, even though, following the bankruptcy of German Pellets, the financial position of the Austrian Sub-Group came under pressure, the group made regular payments to RBI in reduction of its indebtedness. These payments included not only scheduled payments but also extra payments requested by RBI. Mr Wardell referred in particular to the internal memo of RBI dated 3 February 2017 at the time of the transfer of MFC's account to the SEM Group within RBI[20]. Having stated that between 1 January 2016 and 15 January 2017, the group had made debt repayments of some €284m, the memo went on to say:

"These repayments included ordinary repayments as well as some extraordinary repayments requested from MFC (due to the downgrading resulting from German Pellets insolvency), such as the reduction of cash limits in RBI in the amount of EUR 22.5mn due on January 15 2017.

Up to now, MFC has completely fulfilled all its payment obligations to RBI and has reduced its limits from EUR 282mn to EUR 150mn…within the last 12 months."

[19] RB3/795

[20] RB6/1878

96. In summary, submitted Mr Wardell, the picture as at the end of January 2017 was of a debtor which was complying with all its obligations notwithstanding the financial difficulties caused by the German Pellets insolvency. There could be no suggestion of any dishonest conduct at this stage.

97. Once the administrator of German Pellets brought the Voidance Claim against MFCC in April 2017, if MFCC were to fall into insolvency as a result of such a claim being successful, RBI would in turn become vulnerable to a voidance claim in respect of payments made to it by MFCC. It was therefore strongly in RBI's interest that MFCC should not become insolvent, which would be the likely result if formal demand for repayment of its indebtedness were to be made by RBI. In support of this submission, Mr Wardell referred, inter alia, to a letter dated 19 June 2017 from RBI to MFCC[21] where RBI accepts that should the Schwerin District Court issue a judgment for annulment in respect of payments by MFCC to German Pellets, this would have serious negative effects on the economic situation of the MFCC Group. The letter goes on to say that MFCC had informed RBI that it intended to enter into negotiations with the insolvency administrator of German Pellets with the aim of reaching an out of court settlement in order to avoid such an outcome. The letter went on to express RBI's strong support of such a course of action and to record its expectation that such a settlement would be reached.

98. In short, submitted Mr Wardell, D2 did not expect that any money would have to be paid under the Guarantee because it was in the interests of RBI, as well as MFC, that there be a restructuring of the Austrian Sub-Group debt so as to avoid an insolvency and this would be coupled with negotiations by the Austrian Sub-Group with the administrator of German Pellets in connection with the Voidance Claim. In this connection, said Mr Wardell, it was to be noted that a further €3.5m was repaid by the Austrian Sub-Group to RBI on 30 June 2017, at which time RBI must

[21] EAB/4/41

have considered the Austrian Sub-Group to be solvent, otherwise such payment would have been the potential subject of a future voidance claim.

99. Mr Wardell submitted that a powerful pointer in support of MFC having no dishonest intention towards RBI was to be found in connection with the in principle restructuring agreement reached between the parties in October 2017. In his email of 6 October[22] summarising the proposed in principle agreement, Mr Morrow proposed at point 5 that MFC (not MFCC and its subsidiaries) would give security over certain industrial land situated in Germany as collateral for the payments to be made by the Austrian Sub-Group under the in principle agreement. This industrial land was in the ownership of one of the companies which had been distributed out from the ultimate ownership of D2 as part of the Dividend. As Mr Wardell put it, if the Dividend was intended to strip D2 of assets and place them outside of RBI's reach, why would MFC, having just removed these assets from RBI's reach, immediately turn round and offer them as collateral?

100. He submitted that further support for the fact that the directors of D2 were entitled to be of the view that the Guarantee would not be called upon was to be found in an email dated 11 December 2017 from Mr Morrow to Mr Smith and one other, which records Mr Morrow having spoken with Mr Klingler of KPMG on the telephone that day during which conversation Mr Klingler is recorded as having said[23]:

> ***"He spoke to Dellemann today and Dellemann said that the bank's views have changed somewhat for a number of reasons, and they are now not afraid to call the guarantee."***

Mr Wardell submitted that the clear inference from this is that up until that time, RBI had been afraid to call the Guarantee because it would have exposed RBI to possible voidance claims; it therefore had had no intention of doing so. This

[22] RB7/2441

[23] RB13/6565

supported the evidence of Mr Morrow and Mr Smith that, during the restructuring negotiations – and therefore at the time when they undertook the re-domiciliation and the Transactions - there was no expectation at all that the Guarantee would be enforced and therefore no reason for them to strip assets out of D2 in order to try and defeat any such enforcement.

101. Mr Wardell did not dispute that RBI was never specifically informed by MFC of the re-domiciliation, the Transactions or the disposal of D2 out of the Group, but he submitted that RBI ought to have been aware that D2 was no longer part of the Group once it received a memo from Mr Smith dated 26 February 2018[24] and a further memo dated 8 March 2018[25], both written with reference to the financial statements of the Group for the nine months ended 30 September 2017. The memos describe various subsidiaries and the businesses carried out by them. Mr Wardell pointed out that there is no mention of D2 in the memos, with the consequence that RBI ought to have appreciated that D2 was no longer part of the Group. However, it is noteworthy that not all of the companies retained in the new MFC Group are mentioned in the memo; for example there appears to be no mention of D5, which was as at September 2017 the intermediate holding company under D1. In the circumstances, it is not clear to me that this is a point with much force.

102. In his judgment, Parker J noted that there was no proper explanation from the Appellants for the re-domiciliation of D2 and the Transactions, including the disposal to D8. In the absence of such an explanation, he inferred that these were undertaken as part of an intention to defeat RBI's claim under the Guarantee. Mr Wardell submitted that this omission had been rectified by Morrow 9. Mr Morrow had now explained that tax neutrality, which was one of the stated objectives of the Plan of Arrangement, could not be achieved if D2, as an intermediate holding company under D1 and D5, remained in British Columbia. It was necessary therefore, if the objective of tax neutrality was to be attained, that D2 be

[24] RB/7/2785

[25] RB/7/2837

redomiciled in a tax neutral jurisdiction and that was the reason for the move to the Marshall Islands. As to the disposal of D2, Mr Morrow explained at paras 54-56 of Morrow 9 how the Plan of Arrangement took place in the most tax efficient manner so that shareholders in D2 could realise a capital loss. He said that after the Plan of Arrangement, there was no role for D2 in the resulting structure and therefore no reason for keeping it in the structure. That was why it was sold. He asserted that there was nothing sinister in doing so. He went on to say that because D2 was not going to remain in the Group, it followed that MFC needed to make arrangements to remove from D2 all the assets which were intended to be retained in the new MFC Group.

103. Finally, in his written reply submissions – filed after the hearing with the Court's permission because of a lack of time for an oral reply – Mr Wardell addressed the points made above by Mr Penny concerning alleged misrepresentations on the part of the Appellants as follows:

(i) As to the documents relating to the Plan of Arrangement, D2's re-domiciliation was irrelevant to and did not form part of the Plan of Arrangement. It was irrelevant for the purposes of the Plan whether D2 remained in British Columbia or whether assets were taken from D2 into a different subsidiary provided that they remained within the group of companies of which D1 was now the ultimate parent. That was why there was no mention of the re-domiciliation in those documents.

(ii) As to the reference in the minutes of the meeting on 19 April to *'MFC plans to move its holding company from Canada to Cayman Islands, with the Canadian holding company becoming the only participation of the Cayman Islands entity…'* (see para 66 above), this did not imply that D2 would remain a Canadian company. It was more likely simply a reference to D2 as a Canadian company in order to distinguish it from the Cayman entities.

(iii) As to the references to the presentation in May 2017 referred to at para [67] above, this was merely saying that the identity of the guarantor under the Guarantee would remain D2. That was a correct assertion.

(iv) As to the memo dated July 2017 which was sent to Mr Dellemann by Mr Morrow on 18 September 2017 (see para [74] above), the suggestion that this was designed to mislead RBI by failing to mention the redomicile of D2 some months earlier was inappropriate. The memo simply replicated in full the relevant sections of the Plan of Arrangement and therefore it did not deal with re-domiciliation and was not in any way misleading. It was dealing with the position as at June 2017.

(v) As to the alleged misrepresentations relating to the KPMG reports (see para 78 above), Mr Wardell made the point that, if the Appellants had genuinely intended to conceal their fraud, it would have made no sense for them to have expended time, money and effort commissioning the KPMG reports and engaging in the discussions with RBI concerning the restructuring of the debts of the Austrian Sub-Group. In relation to the first KPMG report, it was important to understand that the report related only to the Austrian Sub-Group, not to the various parents such as D2. KPMG were focussing on MFCC's operations. It was therefore not relevant which entity in the Group MFCC was held by. Furthermore, the report was based on financial information and data as at 30 June 2017 and the structure chart in the report made that clear.

(vi) As to the second KPMG report referred to at para [79] above, it was important to recall that this report was prepared for the purposes of exploring an application by D2 under the Canadian Companies Creditors Arrangement Act in the event that RBI called upon the Guarantee. However, as Mr Dellemann accepted at Dellemann 1, foreign companies are entitled to file for protection under the above Act as well as companies incorporated in British Columbia. D2's place of incorporation was therefore not a significant factor.

(iii) Decision on Ground 1

104. Having considered the submissions by Mr Penny and Mr Wardell respectively, I am left in no doubt that RBI has a good arguable case that, when undertaking the Transactions, the Appellants and D2 had the necessary intention to defeat the obligations of D2 under the Guarantee. It is to be emphasised that this is not a finding of fact on the balance of probabilities. That will be a matter for the trial in due course. As already stated, mini trials are not appropriate and the Court can only reach a conclusion on the basis of the material before it at this time without the benefit of discovery, cross-examination etc. In finding a good arguable case, I am applying the test articulated by Mustill J as described above, together with the elaboration by Lord Sumption in Brownlie. In connection with this particular ground of appeal, I find myself in limb (ii) of Lord Sumption's elaboration in that I consider RBI has the better of the argument on the material presently available.

105. I would summarise my reasons for so concluding as follows:

(i) One starts with the fact that, at the time the Guarantee was given in January 2017, D2 as guarantor was the top company in the Group and indirectly owned all the assets of the Group. Its unconsolidated accounts as at 31 December 2016 showed net assets of some $380.8m. Yet, following the Transactions, D2 was sold for $2. As the Appellants state that this was an arm's length transaction, the purchase price must be taken to reflect the value of D2 at that time. Thus, all its value had been stripped out and transferred to the new MFC Group under D1.

(ii) Most significantly, this was all done without MFC informing RBI of what was occurring despite the fact that, throughout the relevant period, there were ongoing discussions in relation to the possible restructuring of the indebtedness of the Austrian Sub-Group. On the face of it, it would have been the natural course for MFC to tell RBI what it was doing and enquire of RBI whether it wished to have a guarantee from the new holding

company (D1) in place of D2. But at no stage has such a replacement guarantee been offered.

(iii) Furthermore, despite the points made by Mr Wardell in his reply, it remains very arguable that, as submitted by Mr Penny, some of MFC's statements went beyond mere silence and constituted misrepresentations as to whether matters had changed from what they were in the first part of 2017. It is also arguable that D2's failure to inform RBI of what was occurring put it in breach of certain disclosure obligations contained in the Guarantee.

(iv) The fact that all the significant assets were stripped out of D2 without RBI being informed that its guarantor was being denuded of its assets, certainly raises a reasonable inference that it was done to defeat RBI's potential claim under the Guarantee.

(v) One looks therefore to see what the Appellants' explanation is. I accept that an explanation has now been given for the re-domiciliation of D2 in the additional evidence by reference to the tax position. However, this does not explain why RBI was not told of the re-domiciliation and had to find this out for itself.

(vi) More significantly, despite Morrow 9 and Morrow 11, I consider that there is still no very satisfactory explanation as to why the assets were stripped out of D2 after the re-domiciliation. Having achieved the tax advantages of re-domiciliation to the Marshall Islands, why were the assets not left in D2, with D2 being owned by D5 and ultimately D1? The only explanation in Morrow 9 at paras 56–57 and Morrow 11 at paras 52-56 is that, following the restructuring under the Plan of Arrangement, it was no longer necessary to keep D2 and it was wished to avoid the costs of keeping it in being when this was not necessary. That was why it was disposed of out of the Group and, because it was no longer going to remain in the Group, it followed that the Appellants needed to make arrangements to remove from D2 any assets which were intended to be retained in the new MFC Group. It will be a matter for trial in due course as to how convincing this explanation is but, on the present available material, and given the number of other companies

and the costs of undertaking and arranging for the Transactions, I do not find it a particularly persuasive explanation at this stage. In any event, there is still no satisfactory explanation as to why RBI was not told of the disposals and of the sale of D2 out of MFC.

(vii) I accept that, as submitted forcefully by Mr Wardell, there is evidence to show a good working relationship between MFC and RBI prior to these events, that MFC was regarded as having been open and transparent by RBI and that it had made substantial reductions in the Austrian Sub-Group's indebtedness in 2016 and the first part of 2017. I also accept that there is evidence to show that both RBI and MFC had a strong incentive to reach an agreement on the restructuring of the Austrian Sub-Group debt and that they were negotiating to achieve this.

(viii) Mr Wardell's key point is that, against this background, the Appellants did not consider that there was any realistic possibility of the Guarantee being called upon at the time the Transactions were undertaken. The parties were negotiating over the restructuring and a successful negotiation would mean that the Guarantee would not be called upon. Furthermore, RBI ran the risk of voidance claims against it in respect of repayments already made if it were to pull the plug on the Austrian Sub-Group's indebtedness and call in the Guarantee. Given their strong belief that there was no realistic possibility of the Guarantee being called upon, it could not be the case that the Appellants' and D2's intention in undertaking the Transactions was to defeat D2's obligations under the Guarantee. It simply did not make sense for the Appellants and D2 to go to the time, trouble and expense of stripping D2 of its assets in order to defeat any claim under the Guarantee when they did not think there was any likelihood of the Guarantee being called.

(ix) These are of course all matters which can be explored in depth at trial and it is certainly not inconceivable that, for the reasons put forward by Mr Wardell, the Appellants would be successful at trial. However, we have to deal with the matter on the material presently available. I do not consider that the points put forward on behalf of the Appellants are sufficient to rebut

the case put forward by RBI and, in particular, to explain the failure to notify RBI of what was being done. Whilst it may well be the case that all the parties hoped the restructuring would be agreed (as indeed it was in principle in October 2017) so that the Guarantee would not be called in, such an outcome was not assured. Indeed, as we know, the restructuring negotiations failed and RBI called in the Austrian Sub-Group's indebtedness in January 2018 and made demand against D2 under the Guarantee in February 2018. There was always the possibility, even at the time of the Transactions, that the negotiations would fail. A hope and expectation that the negotiations would succeed is not inconsistent with a contingent plan to protect MFC's assets from RBI in the event of the negotiations failing.

(x) I accept that MFC offered security over industrial land in Germany as part of the in principle agreement of October 2017 at a time when such land was no longer in the ultimate ownership of D2, as it was owned by a company which had been distributed out as part of the Dividend. As summarised above, Mr Wardell submitted that such action was wholly inconsistent with an intention to defeat RBI's claim under the Guarantee. Again, this will undoubtedly be a matter for exploration at trial, but one can certainly foresee an argument that, in order to achieve a restructuring of the Austrian Sub-Group debt (which was something which would clearly be to MFC's benefit), it was worthwhile for MFC to notionally put back into the pot of assets which would be available to RBI to enforce against, a small proportion of the assets which had been extracted from D2 and would be safe from any enforcement by RBI under the Guarantee. The point made by the Appellants is therefore insufficient to counter the arguments in support of a good arguable case put forward by RBI.

106. For these reasons, I consider that RBI has a good arguable case that the Transactions were undertaken with the necessary intention to defeat its claim under the Guarantee and accordingly I reject Ground 1.

Ground 2 – the Dividend

107. By Ground 2, the Appellants submit that, when holding that the Dividend declared in August 2017 as arguably fraudulent, the judge misdirected himself as to the evidence in relation to the payment of that dividend. He misdirected himself in concluding that the Dividend was arguably a fraudulent transaction which was liable to be set aside under the FDA and/or gave rise to a right to damages for conspiracy.

(i) The factual background

108. As stated at para 13(ii), D2 declared the Dividend on 21 August 2017. It was an in specie dividend expressed to be in the sum $247m and consisted of all the shares held by D2 in M Financial Corp and KHD Investments Limited. M Financial Corp was a company with a substantial part of MFC's assets held beneath it directly or indirectly.

109. As Mr Morrow said at para 58 of Morrow 9, by the Dividend D2 transferred to D5 all the assets which it was intended to retain in the new MFC Group with the exception of the Merchant Bank, the Scully Mine and a company called CTF MEG ('CTF') (which latter company was subsequently transferred back to the new MFC Group out of D2 for the sum of $3.2m in April 2018 after D2 had passed out of the ownership of MFC on 29 September 2017).

110. Although the board resolution of D2 dated 21 August 2017 is signed by V Kodemo as the purported sole director[26], Mr Smith asserts in Smith 5 that he and Mr Morrow determined upon the payments pursuant to the Dividend and, in particular,

[26] RB13/6556

considered the financial position of D2 and whether it would remain solvent after the Dividend.

111. Mr Smith stated in Smith 5 that he and Mr Morrow considered the standalone (i.e. unconsolidated) balance sheet of D2 as at 21 August 2017 both before and after the proposed dividend. According to that document[27], which he exhibited to Smith 5, the position immediately prior to the payment of the Dividend (to the nearest $1m) showed long-term assets of $564m (including investment in subsidiaries of $551m), long-term liabilities (comprising debts payable to various of its subsidiaries) $112m, and total net equity of $455m. The figures also showed that current assets exceeded current liabilities. After payment of the Dividend of $247m, coupled apparently with a write off of the value of KHD in the sum of $53m, the figure for assets was reduced by $300m but all other figures remained the same, thereby leaving net equity of $155m. In short, said Mr Smith, there were sufficient retained earnings to pay the Dividend, and after payment of the Dividend, there were still substantial net assets and furthermore current assets exceeded current liabilities. Accordingly, D2 was not insolvent.

(ii) Limitations of Ground 2

112. Mr Wardell accepted during the course of the hearing that payment of a dividend by a company is a *'disposition of property'* for the purposes of the FDA. The next question therefore in relation to a claim under section 4 is whether it is a disposition *'at an undervalue'*.

113. In BTI 2014 LLC v Sequana SA [2019] EWCA Civ 112; [2019] Bus LR 2178, the Court of Appeal of England and Wales held that a dividend was a payment for which a company received no consideration; see the judgment of David Richards LJ (agreed by Longmore and Henderson LJJ), at [50]. It follows, in my judgment,

[27] RB13/6558

that the payment of the Dividend in this case, as in the case of any payment of a dividend, was a disposition of property at an undervalue for the purposes of section 4 of the FDA.

114. The only question remaining therefore is whether the Dividend was paid with the requisite intention required for section 4, namely an intention by D2 wilfully to defeat the obligation owed under the Guarantee to RBI. I have already held in relation to Ground 1 that there is a good arguable case that each of the Transactions (including therefore the Dividend) was undertaken with an intention to defeat RBI's claim under the Guarantee. It follows that there is a good arguable case against the Appellants in relation to the payment of the Dividend and, specifically, that D2 had the necessary intent to defraud when paying the Dividend and that D1 and D5 conspired in relation to this.

(iii) Insolvency

115. Strictly speaking, that is sufficient to deal with Ground 2. In particular, it is not necessary to address a number of criticisms made by the Appellants of the reasoning of the judge because this Court is exercising its own judgment in relation to Ground 2.

116. However, the Appellants criticise the finding of the judge that there is a good arguable case that the Dividend rendered D2 insolvent, which is relevant to Ground 3. Accordingly, I shall consider that issue. The evidence of both forensic accounting witnesses is central to the submissions on this aspect but, as mentioned earlier, the judge made no reference whatsoever to the accounting evidence adduced on behalf of the Appellants. Accordingly, I propose again to reach my own conclusion on this aspect rather than simply consider whether the judge's conclusion was one which was reasonably open to him.

117. As set out at paras 21 and 22 above, RBI adduced four reports from Mr Lawler (Lawler 1-4) and the Appellants relied on two reports from Mr Marcil (LMD 1-2). Lawler 1 was essentially an investigative report prepared in 2019 on comparatively limited material at a time before proceedings were instituted when RBI was seeking to discover what had happened. The more significant reports for present purposes are LMD1 dated 21 November 2019, Lawler 3 dated 13 December 2019, LMD2 dated 8 January 2020 and Lawler 4 dated 15 January 2020.

118. The Court has had the opportunity of reading all the reports and has also received submissions from the parties in relation to the accounting evidence. However, this is not a trial; it is simply a hearing to determine whether RBI has a good arguable case in relation to certain matters, in this case the insolvency of D2. Accordingly, I propose to set out only very brief summaries of the respective contentions.

119. Mr Lawler considers that payment of the Dividend rendered D2 insolvent, with the result that the Dividend was unlawful. His main reasons for reaching this conclusion appear to be as follows.

120. First, he considers that the 21 August 2017 balance sheet referred to by Mr Smith does not show an accurate position. It suggests net assets of some $155m after payment of the Dividend, being made up of total assets of some $268m and liabilities of $113m (made up mostly of debts owed to subsidiaries of $112m).

121. However, just one month later on 29 September 2017, D2 was sold for $2 in what is said by the Appellants to be an arms' length transaction. This would suggest that at that point (allowing for the fact that the Scully Mine Transfer would take place shortly afterwards and was to be excluded), D2 either had no assets or its assets broadly matched its liabilities.

122. Yet, according to the evidence produced by the Appellants, D2 undertook only three transactions after the Dividend; namely:

(i) the Merchant Bank Transfer on 23 August 2017 (two days after the Dividend) whereby D2 sold D3 (which owned the Merchant Bank) to D1 for a consideration of €12m ($18m) in exchange for an assumption of debts in that sum owed by D2;

(ii) the sale of the Scully Mine for a total consideration of $41m (being $30m for the mine plus $11m for a royalty receivable); and

(iii) the sale of its shares in CTF to a company in the new MFC Group for $3.2m. This latter transaction took place after the sale of D2, but Mr Lawler has nevertheless taken it into account as one of the investments which was clearly retained by D2 after the Dividend.

123. The aggregate sale proceeds for these three transactions comes to $62m. On the basis that, as asserted by the Appellants, these transfers were all carried out for fair value as reflected in the accounts, and given that D2 was considered to have only a nominal value at the time of its sale to D8, this would suggest, says Mr Lawler, that the value of the assets in the August balance sheet were overstated by over $200m.

124. Second, he considered that provision should have been made for the amounts contingently payable under the guarantees issued by D2 (including the Guarantee). This sum came to $130m. He accepts that the test for whether to make provision for a contingent obligation is set out in IOS 37 and turns on whether there is a greater than 50% chance of the guarantee being called. In his opinion, the circumstances were such that provision should have been made for the guarantees (which were called in February 2018) at the time of the Dividend.

125. Third, given the level of overstated assets and of the need to allow for the contingent obligations of $130m, D2 was in a net deficit position after payment of the Dividend and this would be so even if the $130m liability was excluded.

126. In response, Mr Marcil asserts first that, although he has not audited the figures in the 21 August 2017 balance sheet, there is no reason to doubt them as they are

broadly consistent with the audited accounts to 31 December 2016 and the interim accounts to 30 June 2017.

127. Secondly, Mr Lawler's approach ignores the likelihood that D2 had other assets after the Dividend other than the Merchant Bank, the Scully Mine and CTF and that there were corresponding debt obligations. The difficulty with Mr Lawler's approach in trying to work backwards from the sale of the above assets was that he did not take into account the reduction in the corresponding inter-company payables owed by D2 to its subsidiaries when they were transferred to the new MFC Group or were assumed by Mr Lawler to have no value.

128. Third, it was open to the board of D2 to be of the view that it was not necessary to make provision for the guarantees (including the Guarantee). At the time of the Dividend, no demand under any of the guarantees had taken place and discussions were taking place between the parties. It was open to the board to reach the opinion that the prospects of the guarantees being called upon were less than 50%, in which event IOS 37 did not require provision for them to be made.

129. In support of this approach, Mr Wardell pointed out that at para 72 of Lawler 1, Mr Lawler accepted that the directors of D2 might have taken a different view from him about the need to provide for the guarantees in 2017.

130. This is a very brief summary of the respective positions of the accountants for the parties and it does not do full justice to the detailed reasoning in their reports. However, as this case has gone on, I have become increasingly convinced that, without the benefit of oral evidence and cross-examination as well as discovery, it is simply not possible to make a reliable assessment of which of them has the better argument at this stage. Accordingly, reverting to Lord Sumption's summary of good arguable case in Brownlie quoted at para 50 above, I consider that we are in the territory of limb (iii), i.e. is there a good arguable case in the sense of a plausible (albeit contested) evidential basis that D2 was rendered insolvent by the Dividend.

131. In my judgment, there is such a plausible basis. Very briefly:

(i) Mr Lawler is clear in his evidence that payment of the Dividend rendered D2 insolvent and I do not consider that his evidence has been undermined by the LMD reports or by Mr Wardell's submissions to the extent that it has become implausible. I accept that at para 72 of Lawler 1, he stated that the directors might have taken a different view from his about the need to make provision for the guarantees in 2017, but Lawler 1 was written at a time when he was endeavouring to discover what had happened and did not know the full picture. He is clear in Lawler 3 that provision should have been made. The difference between his views in Lawler 1 and in Lawler 3 will be a matter for exploration at trial.

(ii) In particular, I remain unconvinced at this stage by the point concerning an alleged failure on his part to take account of inter-company debts. The Appellants have chosen not to provide evidence about the detailed financial position of D2 immediately before its sale out of MFC for a nominal sum on 29 September 2017. The Appellants could have given helpful evidence about any remaining assets owned by D2 at that time and the inter-company debts as well as to whom they were owed; but they have not done so. In those circumstances, it seems to me perfectly reasonable for Mr Lawler to assume that, as D2 was sold for a nominal sum of $2 to an allegedly independent third party, this was its true value at that time and that the only substantial assets remaining after the Dividend were the Merchant Bank, the Scully Mine and CTF, which were sold for an aggregate price of $62m. Any other assets, if they existed, were either not substantial or were matched by debt obligations at the time of the sale.

(iii) The fact remains that the 21 August 2017 balance sheet shows net assets of $155m (i.e. assets less liabilities) after the Dividend. The sales of the Merchant Bank, the Scully Mine and CTF brought in a total of $62m, which must be taken to have reduced the net value of D2 to a nominal $2. In those

circumstances there is certainly a plausible evidential basis for concluding, in the absence of any clarification from the Appellants, that the figure of $155m must be a considerable overstatement of value and that the real net value of the assets remaining after the Dividend could not have been more than $62m if, as the Appellants contend, the above three Transactions were undertaken at fair value[28].

132. For these reasons I find that there is a good arguable case that D2 was rendered insolvent by payment of the Dividend.

Ground 3

133. By Ground 3, the Appellants assert that, when addressing the Merchant Bank Transfer and the Scully Mine Transfer which were allegedly at an undervalue, the judge failed to have regard to the evidence (and in particular evidence from the Appellants' expert) that showed that the transfers were for full value.

134. As previously, given the judge's failure to mention the Appellants' expert at all, I propose that this Court reaches its own conclusion on this aspect. When doing so, it is necessary to consider the Merchant Bank Transfer and the Scully Mine Transfer separately.

(i) The Merchant Bank Transfer

135. As stated at para 13 above, at the time of the Guarantee, D2 owned D3 (a company incorporated in Malta) which in turn owned the Merchant Bank (also a company incorporated in Malta).

[28] LMD2 accepts at para 171 that, if Mr Lawler is correct about the value of assets remaining in D2 after payment of the Dividend, D2 was insolvent at that time even if it was not necessary to make provision of $130m for the Guarantees.

136. On 23 August 2017, i.e. two days after payment of the Dividend, D2 entered into a share purchase agreement[29] with D1 whereby it agreed to sell 49,999,999 shares (out of 50,000,000) in D3 to D1 for a purchase price of €12,214,306 (equivalent to $18.1m). The purchase price was expressed to be payable as to:

(i) €5,105,953 by D1 assuming the obligation to pay a debt in that sum owed by D2 to the Merchant Bank; and

(ii) D1 offsetting the balance of €7,108,353 against a debt which, it was said in the agreement, had originally been owed by D2 to a company called Merchants Finance Corp (D7), but the benefit of which had been assigned by D7 to D1.

As the agreement involved the sale of a bank, it was necessary to obtain regulatory approval before completion could occur.

137. On 28 September 2017, D2 and D1 entered into what was termed a 'Clarification Agreement'[30]. This explained that the debt of €5,105,593 referred to in the share purchase agreement was in fact owed by D2 to D3, not to the Merchant Bank. It further explained that, as to the debt of €7,108,353, this had been owed only as to €6,323,493 to D7 with the remaining €784,860 being owed by D2 to a company called Notine Holdings Inc., but that the benefit of that latter debt had been assigned by Notine to D1 on 25 September 2017, with the consequence that the aggregate sum of €7,108,353 could be paid by way of set off against the amount owed by D2 to D1.

138. RBI alleges that the Merchant Bank Transfer was undertaken at an undervalue. Parker J summarised the three main grounds relied upon by RBI at [60]-[63] of the judgment and at [104]-[105] essentially accepted those submissions. I would summarise RBI's three grounds as follows:

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[29] RB13/2/6524

[30] RB13/2/6535

(i) It did not accept that the inter-company debts, which the Appellants say were set off, either existed or were owed or capable of being enforced; as such it as not accepted that any consideration was provided.

(ii) Even if the validity of the debts was established, the consideration ($18m) was an undervalue for the shares in D3 given the values at which the Merchant Bank had previously been carried in various sets of accounts.

(iii) Even if the debts existed and the transfer value was not at an undervalue, the consideration paid was an undervalue. This was because D2 was insolvent and a simple set off of debt owed by D2 to other MFC entities did not result in real or actual value in that amount to D2 (or its creditors) and was illusory or at an undervalue compared with the value of the asset (D3) gained by D1 in exchange for the debt set off.

139. Once again, the judge did not refer at any stage to the evidence contained in the two LMD reports and accordingly I consider that this Court should reach its own conclusion on whether there is a good arguable case that the Merchant Bank Transfer was at an undervalue rather than simply reviewing the judge's decision for reasonableness.

140. Mr Wardell attacked the judge's findings in relation to (i) and (ii) of para [138] above. In relation to (iii), he argued, correctly, that the point depended on whether D2 was insolvent at the time of the Merchant Bank Transfer; if it was not, the point did not arise. He did not, thereafter, go on to make any submissions as to what the position would be if the Court were to be against him on whether there was a good arguable case that D2 became insolvent on payment of the Dividend.

141. Given my conclusion set out above that RBI has a good arguable case that D2 was insolvent after the Dividend (and therefore at the time of the Merchant Bank Transfer two days later), I think it preferable to concentrate on ground (iii). If this leads to the conclusion that there is a good arguable case of a transfer at an

undervalue, it will not be necessary to consider grounds (i) and (ii) for the purposes of this appeal.

142. In relation to (iii), Mr Penny referred to Pena v Coyne (No 1) [2004] EWHC 2684 (Ch), [2004] 2 BCLC 703, a decision of Robert Hildyard QC (as he then was) sitting as a deputy judge in the High Court. For present purposes, the relevant facts of that case are as follows. Mr Pena was owed money by the company Vintageset Limited which had become insolvent. Prior to that, it had sold a property to another company called Sunmoor Limited, which was owned and controlled by one of the directors of Vintageset, a Mr Ulloa. The consideration for the property paid by Sunmoor was £575,000, of which £164,000 was treated as satisfying part of the loan account which Vintageset owed to Mr Ulloa. One of the issues before the Court was whether the sale of the property by Vintageset to Sunmoor was a transaction at an undervalue within s423 of the Insolvency Act 1986. In particular, an issue arose as to whether the debt set off of £164,000 could be regarded as having that value given that Vintageset was insolvent with next to no assets.

143. At [109]-[117] of the judgment, the judge explained why he had concluded that the transaction was at an undervalue. I would summarise his reasoning as follows:

(i) Whether a transaction is at an undervalue is a question of actual value and not merely book value.

(ii) If a company is insolvent, with a deficiency of assets, a loan account owed by it is not worth the face value of the loan but only the amount which the creditor in respect of the loan account could expect to recover in insolvency.

(iii) The value of the consideration to the company is therefore not the face value of the loan but only such percentage as the holder of the loan can expect to recover.

(iv) The value of the loan account was of some value to those interested in the liquidation of Vintageset, but only to the extent that their rateable

entitlement to the available assets increased; but given that there were effectively no assets, any benefit was illusory.

(v) The value of the consideration provided by Vintageset was not only the value of the property, but also the value to Mr Ulloa of receiving (in effect) payment in full of the loan of £164,000 (which was in fact clearly not recoverable in full).

144. Mr Penny also referred to the case of Philips v Brewin Dolphin Bell Lawrie Limited [2001] UKHL 2, [2001] 1 WLR 143, where the House of Lords, per Lord Scott of Foscote at [26] considered that, when assessing the value in money or monies' worth of a transaction which was being challenged as having been carried out at an undervalue, the Court may have regard to events which have occurred after the transaction has been entered into.

145. I accept Mr Penny's submission that we are in the same territory in the present case. If the Guarantee and the additional guarantees are valid, D2 would appear to be insolvent and I have already held that there is a good arguable case that it became insolvent immediately following the Dividend. In these circumstances, the value of the consideration to D2 and those interested (i.e. its creditors) is significantly less than the face value of the debts of which D2 was relieved as part of the Merchant Bank Transfer. Similarly, the value of the consideration provided by D2 would not be limited to the shares in D3, but would include the value to D1 of receiving (in effect) payment in full of the debt owed to it by D2 which, following insolvency, would in fact not be recoverable in full. Therefore, as in Pena, the relevant transaction has been undertaken at an undervalue.

146. For these reasons, I find that there is a good arguable case that the Merchant Bank Transfer was a disposition of property at an undervalue. There is similarly a good arguable case in conspiracy. In these circumstances, it is not necessary to consider (i) and (ii) referred to at para [138] above, but it will of course be open to RBI to

run these arguments at trial at well as (iii) and it will be for the judge at trial to determine whether all or any of the grounds are in fact made out.

(ii) The Scully Mine Transfer

147. At the time of the Guarantee, D2 was the sub-lessor of the Scully Mine. When D2 was sold out of the Group by D5 to D8 on 29 September 2017, it was agreed, according to Mr Smith and Mr Morrow, that the value of the Scully Mine would remain with D5 and would therefore be excluded from the sale of D2.

148. On 26 October 2017, D2 disposed of its beneficial interest in the Scully Mine in a series of steps as follows:

(i) First, what has been described as the *'Hive Down'* took place. D2 entered into an agreement with a company incorporated in British Columbia called 1128349BC (D6) whereby D2 agreed to sell its beneficial interest in the Scully Mine to D6 for the sum of $40,918,725, which consideration was to be settled by the issue of 40,918,725 shares in D6 to D2. Immediately following the agreement, D2 executed a declaration of trust in favour of D6 to the effect that it held its interest in the Scully Mine on bare trust for D6.

(ii) On the same day, pursuant to a separate agreement, D2 then sold its 40,918,726 shares in D6 to M Financial Corp for the sum of $40,918,726 which was expressed to be payable in cash to D2. M Financial Corp was owned by D5, having been distributed to D5 as part of the Dividend.

(iii) Although the agreement stated that the cash sum of $40.9m should be paid by M Financial Corp to D2, because of the understanding in relation to the agreement for the sale of D2 referred to at para 147 above, the purchase price of $40.9m was subsequently in fact paid by M Financial Corp to D5, not to D2.

149. A number of issues were raised by the parties in connection with this transaction. For example, RBI submits that the price of $40.9m (which according to Mr Smith was made up as to $30m for the interest in the mine and $10.9m in respect of a receivable) was an undervalue and that the Scully Mine was really worth more. It refers in particular to events which have happened since and the undisputed fact that the mine is now worth very much more than the price for which it was disposed of by D2. The Appellants, on the other hand, submit that this is due to events which have happened since the disposal.

150. However, I do not consider that we need to go into these other arguments. The fact is that, on the basis of the evidence before us, D2 disposed of its interest in the Scully Mine as a result of the transactions on 26 October 2017 for which it was meant to be paid $40.9m in cash, but for which in fact it received nothing, the cash being paid to D5 instead. Mr Wardell sought to argue that it was all explicable by reference to some general waiver of liability of the debts owed by D2 to its immediate parent, but there is nothing in the agreements referred to above to support this assertion. On the contrary, the agreement for the sale of the shares in D6 to M Financial Corp was specific in stating that M Financial Corp would pay $40.9m in cash to D2.

151. It follows that there is certainly a good arguable case that D2 disposed of its interest in the Scully Mine at an undervalue because it received nothing in exchange for its interest in the mine. In the circumstances, I do not think it is necessary to consider the various other matters raised before us. Again, it will be open to RBI to raise such points as it wishes at the trial as to whether a sale for $40.9m (even if paid to D2) was at an undervalue.

Ground 4 – a good arguable case on the FDA and conspiracy claims

152. Mr Wardell and Mr Penny agreed that Ground 4 simply follows on from any decisions in relation to Grounds 1 to 3. On the basis of the views I have expressed

in relation to Grounds 1-3, it follows that there is a good arguable case that the Appellants have entered into fraudulent dispositions within the meaning of the FDA and have entered into an unlawful means conspiracy.

Ground 5 – real risk of dissipation

153. Ground 5 asserts simply that the judge wrongly found that, without an injunction, there was a real risk of dissipation of assets.

154. The judge set out his conclusions on this topic at paras 140-153 of his judgment. I accept Mr Wardell's submission that the basis of his conclusion that there was a real risk of dissipation on the part of the Appellants is his finding of a good arguable case that the Appellants have stripped D2 of its assets with the intention of defeating RBI's claim under the Guarantee. Thus, he concluded para 153 of his judgment by stating:

> ***"There is a current risk of dissipation based on past events which took place within the two-three years."***

155. As he based his conclusion of a risk of dissipation entirely on his finding of a good arguable case on the merits of the claim, I consider that the defect in his approach to good arguable case (see paras 56-57 above) may be said to track through into his reasoning on whether there is a real risk of dissipation of assets. I consider, therefore, that this Court should reach its own conclusion on the risk of dissipation rather than simply reviewing the judge's conclusion for reasonableness. This means that it is not necessary to consider the judge's detailed reasoning or some of Mr Wardell's criticisms of that reasoning because this Court will be considering the matter afresh.

156. There is no real dispute between the parties as to the applicable legal principles. A recent authoritative statement of the position, reached after a detailed review of many of the leading cases, is to be found in the judgment of Haddon-Cave LJ (with

whom McCombe LJ and Sir Stephen Richards agreed) in the Court of Appeal of England and Wales in Lakatamia Shipping Company Limited v Morimoto [2019] EWCA Civ 2203.

157. The brief background to that case was that Lakatamia obtained a worldwide freezing order (WFO) against a Mr Su in support of a claim against him. Subsequently it transpired that there was evidence that Mr Su's mother, Madam Su, had assisted him to breach the WFO by receiving the proceeds of sale of certain properties of Mr Su's in Monaco. Lakatamia then issued proceedings against Madam Su and others on the grounds, inter alia, of unlawful means conspiracy in combining to dissipate Mr Su's assets in breach of the WFO. Having granted Lakatamia a WFO against Madam Su on an ex parte basis, the judge subsequently discharged the order following an inter partes hearing. Lakatamia then appealed to the Court of Appeal against that discharge.

158. At [34] of his judgment, Haddon-Cave LJ adopted (with one correction) the summary of some of the key principles applicable to the question of risk of dissipation by Popplewell J in Fundo Soberano de Angola v dos Santos [2018] EWHC 2199 (Com). Haddon-Cave LJ summarised the principle at [34] as follows:

> ***"(1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.***
>
> ***(2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.***
>
> ***(3) The risk of dissipation must be established separately against each respondent.***
>
> ***(4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has***

been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets may be dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.

(5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.

(6) What must be threatened is unjustified dissipation. The purpose of a WFO is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A WFO is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, provided of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the WFO jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would otherwise not enjoy.

(7) Each case is fact specific and relevant factors must be looked at cumulatively."

159. Haddon-Cave then went on to consider the significance of a finding that there is good arguable case that a defendant has behaved dishonestly when considering

whether there is a risk of dissipation. He carried out a detailed review at [52]-[60] and summarised his view of the position at [51] in the following terms:

> ***"In my view, in the light of the authorities which I consider in detail below, the correct approach in law should be formulated in the following two propositions:***
>
> ***(1) Where the court accepts that there is a good arguable case that a respondent engaged in wrongdoing against the applicant relevant to the issue of dissipation, that holding will point powerfully in favour of a risk of dissipation.***
>
> ***(2) In such circumstances, it may not be necessary to adduce any significant further evidence in support of a real risk of dissipation; but each case will depend upon its own particular facts and evidence."*** [Original emphasis]

160. In my judgment, the approach indicated in Lakatamia as summarised above is equally applicable in Cayman law.

161. Returning to the facts of Lakatamia, Haddon-Cave LJ went on to summarise his reasons for overturning the decision of the judge in the following terms at [61]:

> ***"61. There was clear scope for an inference of dissipation in the present case. The wrongdoing here comprised not merely dishonest conduct (or what Patten J in Field Press called an 'unfocussed allegation of dishonesty or fraud'), but wrongdoing which went to the very heart of the question of the risk of dissipation (in the words of Lloyd LJ in VTB Capital). It was the dishonesty which 'pointed' to the risk of dissipation (in the words of Popplewell LJ in Fundo, supra at paragraph [86(4)]). In other words, both Lakatamia's claims or causes of action against Madam Su bore directly on the question of dissipation itself; both the unlawful means conspiracy and Marex causes of action themselves concerned her assisting in the act of dissipation, albeit if her son's funds, but dissipation nevertheless. The Judge had found…that there was a good***

> ***arguable case that Madam Su had previously helped her son, Mr Su, to hide or dissipate €27,127,855.01 of his assets, i.e. the Net Sale Proceeds. In these circumstances, common sense would suggest that there was a strong inference that there was a risk that she would do exactly the same in relation to her own assets in order to frustrate the enforcement of any judgment against her."*** [original emphasis]

162. Finally, having explained that the Court of Appeal was always reluctant to interfere with the finding of an experienced commercial judge as to whether there was a real risk of dissipation, he nevertheless concluded that it was appropriate to do for two reasons, the second of which he explained at [81] as follows:

> ***"Second, because in any event it is plain that the Judge's decision was wrong. There was a clear inference to be drawn from the Judge's earlier finding of a good arguable case on the merits on the causes of action. The wrongdoing of Madam Su went to the heart of the question of dissipation. This finding taken alone or together with the other evidence outlined above as a whole, meant that the existence of a risk of dissipation was plain and obvious, as correctly submitted by Mr Philips below. Accordingly, the second WFO should have been maintained against Madam Su."***

163. A number of Mr Wardell's arguments against a finding of a risk of dissipation were directed towards showing that the Appellants did not have any fraudulent intent in relation to the Transactions as they were undertaken for bona fide commercial reasons. However, these arguments have already been addressed when considering whether RBI has a good arguable claim on the merits and I have concluded that, despite Mr Wardell's submissions, there is such a good arguable case of fraudulent intent.

164. Mr Wardell raised additional arguments against there being a risk of dissipation as follows:

(i) The actions complained of all occurred within a narrow window in 2017. There was no suggestion of any further attempts to remove assets from the reach of RBI since then and this was despite RBI having taken some time to institute proceedings.

(ii) D1 was a publicly listed company on the New York Stock Exchange. This meant that it would be extremely difficult to dissipate assets from the new MFC Group and any such action would expose the directors to civil and criminal penalties.

(iii) If RBI succeeded in its claims, there would be a remedy for damages in the sum of €44m (being the amount claimed under the Guarantee). The assets of D1, as the new parent company, greatly exceeded this sum. At the date of the hearing before the judge, they were estimated at $395m and since then the value of the Scully Mine had increased very substantially as set out in Morrow 13.

(iv) Any scheme to dissipate assets would have to include the transfer of the Scully Mine, which was now the group's most valuable asset. Any transfer of the mine would give rise to a very substantial Canadian tax charge as set out in paras 21 and 22 of Morrow 13 because of the substantial increase in the value of the mine since the Scully Mine Transfer. The only way to avoid such a tax charge would be to undertake a further Plan of Arrangement with the necessary court approval. It was therefore fanciful to think that the Appellants would take steps to try and defeat RBI's claim.

(v) There was a difference between (i) taking a company out of a group whilst leaving assets within the group (as had effectively happened in relation to D2) and (ii) moving assets out of the group in order to defeat a damages claim. The former was much easier to achieve and would not damage the interests of shareholders, whereas the second would be difficult to achieve and would damage the interests of shareholders.

165. Notwithstanding Mr Wardell's forceful oral submissions and his associated written skeleton, I am of the view that there is indeed a real risk of dissipation of assets if a freezing order is not granted. I reach that conclusion for the following reasons:

(i) As in Lakatamia, the very conduct which forms the basis of RBI's claims consists of a dissipation of assets in circumstances where I have found RBI to have a good arguable case. Where the very claim itself is based upon an alleged dissipation of assets, it is, as Haddon-Cave LJ said, a powerful pointer in favour of a risk of dissipation and it may not be necessary to adduce any further evidence in support of a real risk.

(ii) In this context, it is relevant that the good arguable case involves the Appellants stripping out virtually all the assets of D2, leaving it unable to meet its obligations to RBI. Furthermore, on the basis of this good arguable case, this was done secretly without any notification to RBI despite the allegedly good and transparent relationship between MFC and RBI and despite the fact that throughout this period they were negotiating in respect of the restructuring of the debts owed by the Austrian Sub-Group.

(iii) Furthermore, on the basis of the good arguable case, the Appellants went beyond being guilty simply of secrecy; they actively misrepresented the position to RBI. In effect, RBI's good arguable case is that the Appellants fraudulently dissipated assets out of D2 in order to defeat RBI's claims; it was therefore a classic case of dissipation of assets in order to defeat a claim. In those circumstances, as in Lakatamia, there is a clear inference to be drawn about a real risk of dissipation of assets as a result of the earlier finding of a good arguable case on the merits of the claim, because the claim goes to the heart of the question of dissipation.

(iv) Even if, as Mr Wardell submits, the events complained of took place in 2017, I do not see that as a compelling argument. There has been no particular reason for any further dissipation of assets unless or until RBI brought a claim. I accept also that D1 is a publicly listed company but that

was also the case in respect of D2 until the Plan of Arrangement; it did not stop the Appellants, on the basis of RBI's claim, dissipating assets from D2.

(v) I accept also that there is evidence that the assets of D1 exceed the amount of the claim but that was also the case in respect of D2. Nevertheless, on RBI's good arguable case, this did not prevent the Appellants and D2 from dissipating D2's assets. Similarly, there may be a possible tax cost if the Scully Mine is stripped out but, on RBI's case, the Appellants went to considerable, expensive and time consuming lengths to strip out D2's assets.

(vi) As to Mr Wardell's fifth point, the Appellants, on RBI's case, have managed to retain all the assets within the new MFC Group while rendering D2 incapable of meeting its obligations and I see no reason why similar conduct could not be repeated in the future.

166. All in all, I am satisfied that it is proper to infer from the facts alleged as part of RBI's good arguable claim that there is a real risk of future dissipation of assets with a view to frustrating enforcement of any future judgment.

Ground 6 – no underlying cause of action

167. By Ground 6, the Appellants submit that the judge was wrong to grant the injunction because it was ultimately in support of an arbitration that RBI had not taken steps to pursue and did not intend to pursue until after the present claims were resolved. As stated at para 23 above, the Appellants dispute the validity of the Guarantee as a matter of Austrian law. They assert that the Guarantee was signed using an electronic signature which is not permissible under Austrian law. They further submit that the later *'wet ink'* guarantee produced by RBI is not legally binding because it was not signed with a view to creating legal relations. It is common ground that, as between D2 and RBI, the issue of the validity of the Guarantee must be resolved by arbitration under the rules of the Arbitral Centre of the Austrian Federal Economic Chamber in Vienna.

168. Parker J was aware that the validity of the Guarantee was disputed and was also aware that that aspect would have to be resolved by arbitration between D2 and RBI which had not yet commenced; see paras 16, 31, 77 and 96 of the judgment. He went on to find at para 97 that, on the basis of the expert evidence produced to him, RBI had at least a good arguable case that the Guarantee was valid. The Appellants have not appealed against that finding.

169. The position differs from that before the judge because it is accepted that on 13 January 2021, RBI brought a claim against D2 to enforce the Guarantee before the Arbitration Centre in Vienna.

170. Mr Wardell began with what he described as the well established principle that a freezing order will only be granted if it is ancillary to a substantive claim. He referred in this connection to the well known passage from the judgment of Lord Diplock in Siskina v Distos Cie Naviera SA [1979] AC 210 at 256 in the following terms:

> ***"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action…"***

171. As examples of this principle in action he referred to three cases. First, in Fourie v Le Roux [2007] UKHL 1, the House of Lords upheld a decision to discharge a freezing injunction (which had originally been granted ex parte) on the ground that, at the time it had been granted, no cause of action against the defendant had been identified and the nature of the proceedings in aid of which the freezing order was

being sought *was 'unformulated and inchoate'* (per Lord Scott at [21]). Lord Bingham explained the position as follows at [3]:

> ***"3. In recognition of the severe effect which such an injunction may have on a defendant, the procedure for seeking and making Mareva injunctions has over the last three decades become closely regulated. I regard that regulation as beneficial and would not wish to weaken it in any way. The procedure incorporates important safeguards for the defendant. One of those safeguards, by no means the least important, is that the claimant should identify the prospective judgment whose enforcement the defendant is not to be permitted, by dissipating his assets, to frustrate. The claimant cannot of course guarantee that he will recover judgment, nor what the terms of the judgment will be. But he must at least point to proceedings already brought, or proceedings about to be brought, so as to show where and on what basis he expects to recover judgment against the defendant."***

172. Mr Wardell referred next to the case of Steamship Mutual Underwriting Association (Bermuda) Limited v Thakur Shipping Co Limited [1986] 2 Lloyd's Rep 439. The facts of that case were that the plaintiff association had given a guarantee to a third party who was threatening to arrest a vessel owned by the defendant. The defendant then gave a counter-undertaking to the plaintiff association. Subsequently the plaintiff association sought a Mareva injunction against the defendant on the ground that there was good reason to believe that the plaintiff association was going to be called upon to pay the third party under its guarantee and that the defendant would default on its counter-undertaking. The Court of Appeal upheld the decision of the first instance judge to refuse the application for an injunction because there was no existing cause of action, other than possibly for a declaration. The plaintiff association had not yet been called upon under its guarantee and the defendant had not yet failed to pay under its counter-undertaking. As Sir John Donaldson MR said:

> ***"What the club really wants is security for a future cause of action – a cause of action which will give rise to entitlement to monetary relief. I think that that would be contrary to a long line of authority which says that s 37 is to be used in support of an existing legal or equitable right…"***

173. Thirdly, Mr Wardell referred to the case of Veracruz Transportation Inc v VC Shipping Co Inc (The Veracruz 1) [1992] 1 Lloyd's Rep 353. This was a case where the price for the purchase of a ship was payable on delivery. There was evidence that the ship was about to be delivered in a defective condition, which would give rise to a claim for damages on the part of the buyer, and that the purchase price, when paid, would be the only asset against which an award of damages could potentially be enforced. There was also good reason to believe that, as soon as the price was paid, the seller would immediately move the money beyond reach, rendering the buyer's claim worthless. The judge below granted the buyer a freezing order framed so as to come into effect at the moment when the price was paid over. However, the Court of Appeal discharged the injunction, holding that it had been wrongly granted. This was for the same reason as in the Steamship Mutual case, namely that there was no existing right of action. The ship had not yet been handed over in a defective condition and there was accordingly as yet no claim for a breach of contract on the part of the buyer.

174. Mr Wardell submitted that the position was similar in the present case. The causes of action for breach of the FDA and conspiracy both depended upon RBI having the status of a creditor. This would only be the case if the Guarantee was valid. Whether the Guarantee was valid was not known at this stage and would only become known following the conclusion of the arbitration. RBI would only be a creditor and have a potential cause of action under the FDA or for conspiracy if it was successful at arbitration.

175. There was therefore, submitted Mr Wardell, no existing cause of action. A judge of the Grand Court could not give judgment in favour of RBI at present because the

validity of the Guarantee was crucial to any claim and this would only be established at arbitration in Vienna. Accordingly, the judge would have no alternative but to grant a stay of the present proceedings, if one was applied for, in order to await the outcome of the arbitration. It followed that there was no existing cause of action under the FDA or for conspiracy.

176. I do not accept that the position in the present case is similar to the cases referred to above. In Steamship Association and Veracruz, the events which it was feared would give rise to a cause of action had not yet occurred. Thus, in Steamship Association, no claim under the guarantee had been made against the plaintiff association; it was simply feared that this might happen and that the defendant would not pay. Similarly, in Veracruz, there had been no delivery of a defective ship in breach of contract giving rise to a cause of action; it was simply feared that this would happen. There was therefore no existing cause of action in either case. In Fourie, no potential claim had been identified and that was why the injunction was discharged.

177. The present position is very different. RBI has brought proceedings in the Grand Court for breach of the FDA and for conspiracy. It has an existing cause of action. It has made demand under the Guarantee, has not been paid, and has thereby suffered loss. It asserts that the reason it has suffered loss is because of the wrongful actions of the Defendants in stripping D2 of its assets as described earlier in this judgment.

178. It is, of course, true that it is not certain that RBI will be successful. Thus, if the Guarantee is held to be invalid, its claims will fail. But, as Lord Bingham pointed out in the passage from Fourie quoted at para [171] above, that is often the case.

179. During the course of the hearing, Mr Wardell conceded that, if the validity of the Guarantee had fallen to be determined as part of the proceedings in the Grand Court (because there was no provision for arbitration), there could be no suggestion of

there not being an existing cause of action simply because the validity of the Guarantee was in dispute. That must be correct. It is often the case that elements of a cause of action are in dispute and that is why the test for obtaining a freezing order is the existence of a good arguable case rather than anything stronger. Mr Wardell submitted, however, that the critical difference in this case was that the validity of the Guarantee would not be determined by a judge of the Grand Court as part of his assessment of the cause of action as a whole, but by completely separate arbitration proceedings in Austria.

180. I cannot accept that this makes any difference. The judge has found that there is a good arguable case that the Guarantee is valid. If the Guarantee is valid, there is also a good arguable case that RBI will be successful against the Appellants in its claims under the FDA and for conspiracy. There are a number of matters which fall to be proved in order for it to succeed which are disputed, e.g. whether transactions were at an undervalue. The fact that one disputed element relates to the validity of the Guarantee and that this aspect will be resolved by arbitration in Austria rather than by a judge of the Grand Court does not affect whether RBI has an existing cause of action. It merely determines who will decide whether a particular aspect of the existing cause of action is in fact made out.

181. For these reasons, I reject Ground 6.

182. I should add that, since the hearing of this appeal, the Privy Council has issued its judgment in the important case of Broad Idea International Limited v Convoy Collateral Limited [2021] UKPC 24. In a magisterial judgment delivered by Lord Leggatt, the majority of the Board held that the requirement for an existing cause of action (in the sense applied in Steamship Association and Veracruz) was no longer necessary. At [100], Lord Leggatt said:

> ***"…The time has long since come to state unequivocally that the practice followed in the Veracruz 1 is likewise unsound in***

principle, unfit for modern commerce and should no longer be adopted."

183. At [85], Lord Leggatt referred to the observation of Lord Nicholls in Mercedes Benz AG v Leiduck [1996] AC 284, that the essential purpose of a freezing injunction was to facilitate the enforcement of a judgment or order for the payment of a sum of money by preventing assets against which such a judgment could potentially be enforced from being dealt with in such a way that insufficient assets were available to meet the judgment. Lord Leggatt referred to this as 'the enforcement principle'. Having discussed the position at some length he made the following observations:

"90. Once it is appreciated that the essential purpose of a freezing injunction is to facilitate the enforcement of a judgment or other order to pay a sum of money, it is apparent that there is no reason in principle to link the grant of such an injunction to the existence of a cause of action.

……

92. In applying for a freezing injunction, the relevance of a cause of action, where there is one, is evidential: in showing that there is a sufficient basis for anticipating that a judgment will be obtained to justify the exercise of the court's power to freeze assets against which such a judgment, when obtained, can be enforced.

……

99. …Once it is recognised that, as Lord Mustill put it, with a freezing injunction 'the right to the injunction and the ultimate right to damages or whatever else is claimed in the action are wholly disconnected' (see para 90 above), there is no justification for requiring that a right to sue for damages or another form of money judgment must already have accrued before the injunction can be granted. What matters is whether

there is a sufficient likelihood (evidenced by the requirements of an intention to institute proceedings and a good arguable case) that a judgment will be obtained and that it will be rendered ineffective unless the court acts now to grant an injunction. Those requirements were all clearly satisfied in The Veracruz 1.

…..

102. Although other factors are potentially relevant to the exercise of the discretion whether to grant a freezing injunction, there are no other relevant restrictions on the availability in principle of the remedy. In particular:

(i) There is no requirement that the judgment should be a judgment of the domestic court – the principle applies equally to a foreign judgment or other award capable of enforcement in the same way as a judgment of the domestic court using the court's enforcement powers.

(ii) Although it is the usual situation, there is no requirement that the judgment should be a judgment against the respondent.

(iii) There is no requirement that proceedings in which the judgment is sought should yet have been commenced nor that a right to bring such proceedings should yet have arisen: it is enough that the court can be satisfied with a sufficient degree of certainty that a right to bring proceedings will arise and the proceedings will be brought (whether in the domestic court or before another court or tribunal)."

184. We did not hear argument in relation to this judgment and I accept that the above observations were obiter as not being essential to the decision in that case. Nevertheless, the judgment was issued after full argument on the point and the above observations are extremely persuasive. In my respectful view, they also accord with the requirements of modern commercial life. Accordingly, had I felt unable to distinguish the Steamship Association and Veracruz cases, I would have

followed the lead given by the Privy Council to the effect that they should no longer be followed. I would therefore have rejected Ground 6 for this additional reason.

Ground 7 – No cap on the freezing order

185. By Ground 7, the Appellants submit that the judge wrongly failed to cap the freezing order at a figure of approximately €44m.

186. The judge accepted at para 183 of his judgment that the usual practice in respect of a freezing order is for the Court to include a maximum sum. However, this need not be done in exceptional cases and in this context he referred to the decision of the English Court of Appeal in London And Quadrant Housing Trust v Prestige Properties Limited [2013] EWCA Civ 130.

187. He went on at paras 184-187 to explain why he was not going to include a maximum sum in this case and I would summarise his reasons as follows:

(i) The Appellants were responsible for obscuring the true state of affairs and the true financial position.
(ii) The Appellants had given incomplete and misleading evidence.
(iii) The Appellants had failed to comply properly with asset disclosure requirements.
(iv) The freezing order only applied to certain specified assets rather than all of the Appellants' assets and there was no evidence from the Appellants that the order omitting any maximum sum was causing any difficulty or restricting their enjoyment of the assets in question.
(v) On the basis of his interpretation of the effect of s6 of the FDA, RBI, if successful, would be entitled to an order under section 6 in the sum of €105m (being the total amount of D2's indebtedness on the evidence and payment of which would be necessary to enable RBI to make full recovery as creditor). The evidence as to the value of D1's assets was not very

satisfactory. If one took its value as reflected by its share price, D1's worth was some $172m, which was about the same as the figure of €105m.

188. Mr Wardell submits that these reasons are not sufficient to justify the lack of a cap. I bear in mind that this was a discretionary decision for the judge and this Court may only interfere if that decision is plainly wrong. However, I have come to the conclusion that the decision not to impose a cap was outside the band of decisions reasonably open to the judge.

189. One starts from the position that an interlocutory freezing order is a very significant interference with a defendant's freedom to conduct his affairs as he sees fit and furthermore, it is imposed at a time when a defendant's liability has not been established. The purpose of the order is not to provide security for a plaintiff but is to prevent a defendant from rendering a plaintiff's success in obtaining a judgment a pyrrhic victory by disposing of his assets so that there is nothing against which the judgment can be enforced.

190. The purpose of a freezing order serves this purpose entirely satisfactorily if it is capped at the maximum sum which the plaintiff could recover. Any assets frozen beyond that sum do not protect the legitimate interests of a plaintiff because, even if they are all disposed of, there will still be sufficient assets against which the judgment can be enforced in due course. That is why freezing orders almost invariably contain a cap. The ability of a defendant to deal freely with his assets which go beyond the cap cannot possibly prejudice the plaintiff's position even if he is entirely successful in his claim.

191. I accept that on rare occasions, a Court will not impose a cap but there must be exceptional reasons to justify such a course. The judge and RBI on this appeal relied upon a passage from the judgment of Kitchin LJ in London and Quadrant as follows:

> ***"21. I recognise that a court will normally insert a maximum sum into a freezing order in order to avoid any unnecessary interference with a defendant's freedom to deal with his assets as he wishes. But this is a most unusual case. It is one where the second and third defendants controlled the first defendant and rendered it impossible properly to discern important aspects of its affairs; deliberately sought to obscure the truth about the first defendant's financial position; gave brazen and dishonest evidence and failed to disclose anything about the value of the property interests which any of them held. Moreover, as I have said, the defendants…have never revealed the extent of their assets or how the order may be interfering with the defendants' legitimate enjoyment of those assets. Further, it is, I think, relevant that the injunction is only directed to freehold or leasehold property in which any of the defendants have an interest. It does not impact in any way upon their freedom to deal with any other assets they may own. In all these respects, the case is, in my judgment, a highly unusual one and, in my view, it cannot be said that the judge fell into error in failing to impose a financial limit on his order…."***

192. Mr Penny submitted that, on the judge's findings, the position was similar in this case.

193. In my judgment, there is a very significant difference. A full trial had occurred in London and Quadrant and the freezing order was therefore to aid enforcement post judgment. The liability of the defendants had been established and the findings as to their brazen dishonesty was made after a nine day trial and full exploration of the facts.

194. That is very different from the present case where the liability of the Appellants has yet to be established and where any view of the judge as to the honesty of Mr Smith and Mr Morrow in their evidence can only be provisional as it has been reached on the basis of affidavit evidence and without the benefit of oral evidence or cross-examination.

195. It is true that a factor mentioned by Kitchin LJ in support of his conclusion was that the freezing order in that case was limited to certain specified property and that is also the case here. However, that was only one of the many factors relied upon by Kitchin LJ and, furthermore, the order was more specific in that case. It simply restrained the defendants from disposing of or dealing with freehold or leasehold property, whose value appears to have been very uncertain. In our case, the Appellants are ordered not to *'...in any way dispose of, deal with or diminish the value of...'* the Appellants' interest in any of the assets specified in schedule 1, which assets consist of shares in a number of specified companies together with the interest in the Scully Mine. Whilst it is not a general freezing order, it is, in my view, wider and more intrusive than the order in London and Quadrant. In my judgment, London and Quadrant was a case which very much turned on its own special facts.

196. I do not see that the matters relied upon by the judge as listed above are sufficient to justify the exceptional step of not imposing a cap. If the freezing order in this case is capped at the maximum amount of RBI's claim, I do not see any justification for going beyond that. RBI will be protected from finding that it has a judgment it cannot enforce, which is the legitimate purpose of freezing orders. Save in very exceptional circumstances, it cannot be right to restrict a defendant from dealing with his assets beyond the degree necessary to protect a plaintiff's legitimate interests by reference to the maximum amount of his claim. I do not consider that the reasons relied upon on the judge amount to such exceptional circumstances.

197. The question then arises as to what should be the level of the cap? In the absence of consideration of this issue by the judge, this Court must reach its own decision.

198. Mr Wardell submits that any cap should be fixed at €44m because this is the amount claimed under the Guarantee and RBI's current pleading specifically restricts its claimed loss to the amount due under the Guarantee. Mr Penny, on the other hand,

submits that the cap should be fixed at €153m, being made up as to €137m as the total indebtedness (on current information) of D2, together with a provision of €12m for interest until trial and a further €4m for anticipated costs. It seems to me that the detailed submissions of counsel raise three main issues for determination.

(i) The effect of section 6 of the FDA

199. For convenience, I repeat section 6 which is in the following terms:

> ***"A disposition shall be set aside under this Act only to the extent necessary to satisfy the obligation to a creditor at whose instance the disposition has been set aside together with such costs as the Court may allow."***

200. Mr Penny argues – and the judge agreed – that if the transferor company is insolvent, the provision must mean that the disposition must be set aside to the extent necessary to put back into the transferor company sufficient to enable the creditor to be paid in full; otherwise the obligation to the creditor would not be *'satisfied'*.

201. Mr Wardell, on the other hand, submits that section 6 means that the disposition should be set aside simply to the extent of the creditor's claim, which in this case would be €44m.

202. We did not hear full argument on this aspect and nothing I say in what follows is intended to amount to a final determination of the proper construction of section 6. That will be a matter for the trial judge in due course. However, it seems to me that there is certainly a good arguable case that Mr Penny's construction is correct. Section 6 speaks of setting aside the disposition to the extent necessary to *'…satisfy the obligation to a creditor at whose instance the disposition has been set aside…'*. Where a company is not insolvent, then clearly the disposition will simply be set aside to the extent of the creditor's claim. But if a company is insolvent, setting the

disposition aside simply to the extent of the claim would not result in the obligation to the creditor being satisfied. The result would be that the creditor would only receive a proportionate part of his claim depending upon the level of insolvency and the percentage of the claims of all creditors which could be met.

203. On the basis of the evidence before the Court[31], the total indebtedness of D2 is €137m. If provision for interest and costs until trial in the sum of €16m (see para 198 above) is included, RBI submits that the sum necessary to be put back into D2 to enable RBI to be paid in full would be €153m. That is therefore the maximum amount of its claim for the purposes of a cap.

204. Mr Wardell submitted that there is no evidence that D2 is insolvent. I cannot accept that submission. I have already held that there is a good arguable case that D2 was rendered insolvent as a result of the Dividend. Since then, it has been sold for $2 and, if RBI's claim is successful, will now face very substantial claims. There is nothing before the Court to suggest that it is in a position to pay such claims. I am therefore of the view that there is a good arguable case that it is insolvent if RBI's claim is well founded.

(ii) Limitation to the current claim

205. As previously stated, the current claim of RBI is limited to the loss which it has suffered by reference to non-payment of the Guarantee. This was said to stand at some €44m at the date of the hearing before Parker J.

206. Since the hearing before the judge, RBI has applied for leave to amend its claim so as to include reference to four further guarantees which D2 executed in RBI's favour. The principal amount outstanding under these four guarantees is said to be

[31] Affidavit of C Levers, EAB/17/451 at paras 17-20

€43m. The application to amend the statement of claim is listed for hearing before Parker J on 16-17 December 2021.

207. Mr Wardell submits that any cap should not take into account these additional guarantees. The claim currently before the Court is limited to €44m and that should therefore be the cap. If and when leave is given to RBI to amend its claim so as to include the four other guarantees as part of its claimed loss, RBI can at that stage apply to increase the cap accordingly.

208. I accept that, in the ordinary way, any cap is likely to be fixed by reference to the maximum claim as reflected in the pleadings. However, this is not an inflexible rule. As Lord Leggatt said at [102] of his judgment in Broad Idea International quoted at para 183 above, there is no requirement that proceedings in which judgment is sought should yet have been commenced, nor that a right to bring such proceedings should yet have arisen; it is enough that the Court can be satisfied with a sufficient degree of certainty that a right to bring proceedings will arise and that proceedings will be brought. If that is right in relation to proceedings which have not yet been brought, it seems to me that it should be equally applicable where there is an anticipated amendment to increase the value of the claim. It will of course be a matter for Parker J as to whether leave is given, but I am satisfied at present that the prospects of RBI obtaining leave are sufficient to justify imposing a cap which assumes that the application to amend will be successful. In the event that it were to be unsuccessful, it would of course be open to the Appellants to apply to reduce the cap to the level of the maximum unamended claim and one would expect such an application to be successful.

(iii) Should the cap be limited by reference to the damages claim against D1/D5?

209. Mr Wardell submitted that, even if the Court was against him on the possible interpretation of s6 of the FDA, the cap should be fixed by reference to the maximum amount of the claim in conspiracy against D1 and/or D5, rather than by

reference to the claim under the FDA, which was against D2. It was, he submitted, fanciful to suppose that the claim against D2 under the FDA would be successful but that the claim against D1 and/or D5 for conspiracy would be unsuccessful. They would clearly stand or fall together. In the circumstances, a remedy of damages against D1 and/or D5 there be sufficient remedy and there will be no need for the various transactions to be set aside to the necessary extent, which would be complicated and time consuming.

210. There is certainly force in this submission, but it is impossible to be confident at this stage that that will inevitably be the outcome if the FDA claim is successful. The Transactions involve different transferees (and subsequent transferees) and not all of them involve D1 and/or D5. Given the overall background as I have described it, I consider that the prudent course is to fix a cap by reference to the maximum liability in the event of the FDA claim succeeding. It follows that I would fix the cap at €153m.

211. If I had been persuaded that the cap should be fixed by reference to the damages claim against D1 and/or D5, I would, for the reasons set out at paras 205 – 208 above, have found that the cap should be fixed at €107m. As set out at para 149 of RBI's skeleton, this would be made up as to $91m outstanding under the five guarantees (including the Guarantee) together with the sum of €16m in respect of interests and costs as set out at para 198 above.

Conclusion

212. In summary, I would reject Grounds 1-6 of the grounds of appeal but accede to Ground 7 to the limited extent of imposing a cap in the sum of €153m. It follows that the appeal is allowed to the limited extent of varying the two freezing orders by imposing a cap of €153m. Counsel are requested to prepare a draft order to this effect for the Court's consideration.

Morrison JA

213. I agree.

Moses JA

214. I also agree.